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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-1588

CAROL VANCE, ET AL.,

Appellants,

V.

UNIVERSAL AMUSEMENT CO., INC., ET AL.,

Appellees.

GEORGE E. MCCREA, ET AL,

Appellants,

V.

KING ARTS THEATRE, INC.,

Appellees.

* * *

On Appeal From The United States Court of Appeals For The Fifth Circuit

* * *

JURISDICTIONAL STATEMENT

* * *

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* * *

On Appeal From The United States Court Of Appeals For The Fifth Circuit

* * *

JURISDICTIONAL STATEMENT

* * *

Appellants, Carol Vance, George E. McCrea, et al., appeal from the part of the judgment of the United States Court of Appeals for the Fifth Circuit, entered on December 18, 1978, which held unconstitutional a statute of the State of Texas, Article 4667(a)(3), Vernon's Texas Civil Statutes, and submit this statement to demonstrate that the Supreme Court of the United States has jurisdiction over this appeal and that a substantial question is presented.

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Fifth Circuit was entered on September

28, 1977, by a three judge panel, the opinion holding, in part, that Article 4667(a)(3), Vernon's Texas Civil Statutes was unconstitutional; the opinion is reported at 559 F.2d 1286. On rehearing *en banc*, the Court in its opinion entered on December 18, 1978, held that this statute was unconstitutional, the opinion being reported at 587 F.2d 159. Eight judges voted with the majority opinion and six judges dissented.

Notice of Appeal was given by these Appellants on January 15, 1979.

PRELIMINARY STATEMENT

Twenty cases involving the question presented by the appeal as well as other questions were consolidated before a three-judge court. That court determined that Article 4667(a)(3) was unconstitutional, the opinion being reported at 404 F. Supp. 33, and an appeal was made to the United States Court of Appeals with the results described above.

A concurrent appeal to the Court of Appeals was made by Bexar County District Attorney and Emil Peters, City of San Antonio, Texas, the appeal involving Article 4667(a)(3) and other statutes of the State of Texas. These same parties have filed a separate appeal and Jurisdictional Statement in this Court, which appeal again raises the question of the constitutionality of Article 4667(a)(3) and other matters not presented by the instant appeal.

STATUTE INVOLVED

The Texas nuisance statute, Article 4667, Vernon's Texas Civil Statutes, reads in pertinent part as follows:

> Injunctions to abate public nuisances
>
> (a) The habitual use, actual, threatened or contemplated, of any premises, place or

> building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the state or any citizen thereof:
>
> (1) . . .
>
> (2) . . .
>
> (3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;

Article 4666, Vernon's Texas Civil Statutes is not involved in the appeal by Appellants Vance and McCrea. This Article permits the mandatory closing of premises in certain nuisance situations; however, this provision was never applied by these Appellants, was not a part of their appeal to the Court of Appeals and the ruling of the Court of Appeals (majority opinion)--that the closing provisions are unconstitutional as applied to motion picture houses or book stores--is not questioned by these Appellants in this Court.

STATEMENT

The Article 4667 Injunction Process

No injunction prohibiting the dissemination of obscene materials was entered in the Fifth Circuit titular case, *King Arts Theatre, Inc. v. McCrea*, and the lead case, *Universal Amusement Company, Inc. v. Vance*, the original case before the three-judge district court, was settled and became merely the vehicle for the appeal to the Court of Appeals for all consolidated cases except for *Dexter v. Butler*, wherein a separate appeal was taken both to court below and to this Court.

However, in some of the other consolidated cases a state court injunction was issued. In the case of *State v. Stambaugh*, No. 216,943 in the 126th Judicial District

Court of Texas, an injunction enjoined the manager of an Austin book store and movie arcade from using the premises to disseminate obscene materials. That state case and injunction was questioned in *San Antonio Book Mart, Inc., d/b/a Austin Book Mart v. Smith, et al.*, a cause filed in the United States District Court for the Western District of Texas, Austin Division, and one of the cases consolidated with *Universal* in the three-judge district court. A copy of the injunction is attached as Exhibit III to illustrate the kind of injunction entered pursuant to Article 4667(a)(3). The injunction is drawn in accordance with the Texas law in this sensitive area of prior restraint which in turn follows the law of this Court in determining the validity of such restraint. See *Moore v. Texas*, 470 S.W.2d 391 (Tex. Civ. App. - San Antonio 1971); *Richards v. Texas*, 497 S.W.2d 770 (Tex. Civ. App. - Beaumont 1973); and *Locke v. State*, 516 S.W.2d 949 (Tex. Civ. App. - Texarkana 1974).

The attached, example injunction in *State v. Stambaugh, supra*, comports with the obscenity standards of *Miller v. California*, 313 U.S. 15 (1973), adopted by Texas in *State v. West*, 489 S.W.2d 597 (Tex. Crim. App. 1973). In essence, the Article 4667(a)(3) injunction enjoins only films, books, and magazines which depict:

(1) Sexual intercourse,

(2) Oral or anal sodomy, and

(3) Bestiality

and which further:

(1) Have a dominant theme which taken as a whole appeals to the prurient interest in sex, nudity or excretion,

(2) Portray sexual conduct in a patently offensive manner, and

(3) Do not have, when taken as a whole, any serious literary, artistic, political or scientific value.

Moreover, notice should be taken that the judge in his order issued in *State v. Stambaugh, supra* indicated his refusal to enter a temporary restraining order without notice and hearing in an obscenity-oriented injunction proceeding.

An injunction in the form entered above, as required by Texas law and the decisions of this Court, presents a dubious tool for the control of obscenity. Under Texas law, the complainant must prove, after notice to a claimed violator of the injunction, all of the terms of the injunction: a depiction of sexual intercourse, sodomy or bestiality *plus* the *Miller v. California* requirements, prurient interest, patent offinsiveness and lack of serious literary, artistic, political or scientific value. See Rule 692, Texas Rules of Civil Procedure, which provides:

> Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt. In case of such disobedience, the complainant, his agent or attorney, may file in the court in which such injunction is pending or with the judge in vacation, his affidavit stating what person is guilty of such disobedience and describing the acts constituting the same; and thereupon the court or judge shall cause to be issued an attachment for such person, . . . or said court or judge may issue a show cause order, directing and requiring such person to appear on such date as may be designated and show cause why he should not be adjudged in contempt of court. On return of such attachment or show cause order, the *judge shall proceed to hear proof; and if satisfied that such person has disobeyed the injunction*, either directly or indirectly, may

> commit such person to jail without bail until he purges himself of such contempt, ... [Emphasis supplied]

And see *Locke v. State, supra,* wherein the Court observed, in considering a possible contempt hearing for the showing of obscenity, that:

> . . .the State will have the burden to prove that the exhibition comes within the narrow limits of the injunction. Under these circumstances there appears to be no danger that protected matter will be suppressed or that the appellant will have any doubt about the legality of his future conduct.

Thus, each alleged violation of an injunction must be shown by proof by the complainant; and the violator need only purge himself of contempt by agreeing not to exhibit or sell the offending material.

Accordingly, the injunction is not an imposing weapon with which to combat obscenity. However, the efficacy of the injunction as opposed to criminal statutes for obscenity control, is not in question in this case, but the very cumbersomeness and the ineffectualness of the injunction process illuminates the basic issue and its answer: an Article 4667(a)(3) injunction does not prohibit the dissemination of possible First Amendment materials any more than do the Texas criminal statutes, and probably less.

THE QUESTIONS ARE SUBSTANTIAL

1. The Majority Opinion of the Court of Appeals Holding That Article 4667(a)(3) Is a Per Se Violation of the First Amendment Rests on Incorrect and Inconsistent Interpretations of State and Federal Law.

The majority opinion finds fault with the temporary

injunction procedures of Texas and finds that procedural safeguards are lacking, noting that the only test applied by a Texas court at a temporary injunction hearing is the showing of a "probable right" and a "probable injury." (Majority Opinion, 587 F.2d 170) The court then observes that on appeal from the temporary injunction the Appellant cannot argue that the suppressed material is not obscene. (587 F.2d 170) This interpretation overlooks the court's own earlier citations to *Moore v. Texas, supra,* and *Locke v. State, supra,* in which the appellate courts examined the validity of the temporary injunctions on appeal in terms of obscenity standards and not merely in the framework of "probable right" and "probable injury."

The court further overlooks the enforcement procedures of the Texas law which require proof of *Miller* standards at a contempt hearing. Thus, even if the majority opinion is correct with respect to the scope of appellate review, a contempt hearing will require the Complainant to prove a full obscenity case, a situation no different than the filing of a criminal charge and a resulting trial on the charge.

The majority opinion also ignores or misinterprets vital portions of the state court opinions in *Locke* and *Richards v. State,* observing that the cases stand for the proposition that while an injunction cannot merely prohibit the future showing of "obscene films," an injunction may validly enjoin the exhibition of "films portraying acts of sexual intercourse, deviate sexual intercourse and bestiality." The majority ignores the portion of these opinions which also require that the foregoing acts generate the *Miller* requirements of (1) appeal to the prurient interest, (2) patent offensiveness and (3) the lack of redeeming social values.

The combination of enjoining the exhibition of films depicting specific acts, coupled with the requirement

that such acts come within the *Miller* criteria, mandate the conclusion that a Texas court injunction against the showing of future obscenity is no more vague than any valid state or federal criminal statute prohibiting the dissemination of obscenity. Adding in the proof requirements of any contempt hearing, the obscenity injunction constitutes no greater prior restraint than any criminal statute.

2. The Majority Opinion of the Court of Appeals is in Conflict With the Decisions of This Court Since the Opinion in Effect Refuses to Countenance Prior Restraint Under Any Circumstances.

The majority opinion holds:

> An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive . . . . "[t]his is the essence of censorship." (587 F.2d 169)

Apparently, the majority is condemning all prior restraint of possible First Amendment materials whatever the language of an injunction (or ordinance or statute) and regardless of the procedures required for proving violations of the injunction (or ordinance or statute).

This holding is not in accordance with the decisions of this Court which have recognized that prior restraint is permissible in certain situations. *Near v. Minnesota*, 283 U.S. 697 (1931); *Kingsley Books v. Brown*, 354 U.S. 436 (1957); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Time Film Corporation v. City of Chicago*, 365 U.S. 43 (1973); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546.

This Court observed in *Southeastern Promotions* that a system of prior restraint is permissible if:

> . . . it takes place under procedural safeguards designed to obviate the dangers of a censorship system. 420 U.S. at 559.

The procedural safeguards are present in the Texas injunctive process.

The decision of the Court of Appeals should be reversed as being inconsistent with the decisions of this Court.

3. The Award of Attorneys' Fees to the Prevailing Parties Raises a Substantial Question.

The Court of Appeals in finding Article 4667(a)(3) unconstitutional made the following ruling with respect to attorneys' fees:

> Accordingly, we remand the case to the managing judge of the district court with directions to set reasonable attorneys' fees in accordance with the standards established in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5 Cir. 1974).

This determination raises substantial questions of fact and law. Twenty cases were consolidated under the umbrella of one three-judge court presenting different issues and with the parties to the various cases taking different positions as to the law involved. Different cases involved different attorneys for both plaintiffs and defendants, and some parties, once these cases were consolidated, were forced into areas of litigation not originally contemplated.

The lead case, *Universal Amusement Co. v. Vance*, has long been settled. In *King Arts Theatre, Inc. v. McCrea*,

no injunction was even issued against *King Arts*, yet attorneys' fees will apparently be levied against *George E. McCrea*, the County Attorney who once contemplated the seeking of an injunction against *King Arts Theatre*.

A decision by this Court reversing the Court of Appeals determination that Article 4667(a)(3) is unconstitutional, which Appellants strongly urge, will avoid the complicated and prolonged business of making an equitable award of attorneys' fees in this cause.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of general public importance. The Appellants pray that the judgment below, holding Article 4667(a)(3) to be unconstitutional, be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, hereby certify that two copies of the above and foregoing Jurisdictional Statement have been served by placing same in the United States mail, postage prepaid, certified, on this the ____ day of April, 1979, to each of the following: Frierson M. Graves, Jr., 2020 First Tennessee Building, Memphis, Tennessee 38103; and Gerald Goldstein, 2900 Tower Life Building, San Antonio, Texas 78205.

LONNY F. ZWIENER

UNIVERSAL AMUSEMENT COMPANY, INC., et al., Plaintiffs-Appellees,

v.

Carol VANCE et al., Defendants,

State of Texas, Defendant-Appellant.

Richard C. DEXTER, Plaintiff-Appellee,

v.

Ted BUTLER, District Attorney of Bexar County, Texas, et al., Defendants-Appellants.

SOUTHLAND THEATRES, INC., et al., Plaintiffs-Appellees,

v.

Ted BUTLER, District Attorney of Bexar County, Texas, et al., Defendants-Appellants.

No. 75-4312.

United States Court of Appeals, Fifth Circuit.

Sept. 28, 1977.

In three cases involving challenges to Texas statutes dealing with showing of obscene films and actions taken by local officials under other statutes against motion picture theaters, a three-judge District Court for the Southern District of Texas, John V. Singleton, Jr., J., 404 F.Supp. 33, entered judgment and appeals were taken. The Court of Appeals, Gee, Circuit Judge, held that: (1) statute authorizing suits to enjoin a nuisance, and if an establishment is adjudged a nuisance, providing for closing of establishment for one year, is inapplicable to premises used for exhibiting obscene material; (2) statute authorizing injunction after judicial determination that obscene material has been shown or distributed or manufactured on premises does not constitute a prior restraint; (3) statute creating the felony offense of possessing a "criminal instrument" does not apply to film projector used to exhibit obscene film; (4) seizure of theater's projector provided substantial support for finding of harassment and prosecution in bad faith; (5) hearings conducted at theater substantially approximated adversary hearing where theater operator was given notice and an opportunity to be heard on question of obscenity and was advised that he could bring counsel to the proceedings; (6) as an evidentiary hearing might be necessary, court would remand case to district court for determination and award of attorney fees.

Reversed and rendered in one case; affirmed and remanded in second case.

Thornberry, Circuit Judge, dissented in part and concurred in part and filed opinion.

1. Nuisance ⇐80

Statute authorizing suits in name of state to enjoin a nuisance and providing a one-year closing remedy for establishment adjudged a nuisance is inapplicable in actions involving exhibition of obscene films; statute authorizing injunction against the commercial manufacture, distribution or exhibition of obscene material provides the exclusive procedure for abating obscene exhibitions as nuisances. Vernon's Ann.Civ.St. arts. 4664–4667(a)(3); U.S.C.A.Const. Amend. 1.

2. Nuisance ⇐77

The attachment of the name "nuisance" to list of enjoinable activities in statute pertaining to commercial manu-

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APPENDIX I

facture, distribution or exhibition of obscene matter was not intended to key in the remedies of statute providing for one-year shutdown of establishment adjudged a nuisance. Vernon's Ann.Civ.St. arts. 4664, 4666, 4667(a); U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐90.1(8)
Nuisance ⇐60

Statute authorizing an injunction against the commercial manufacture, distribution or exhibition of obscene material after a judicial determination that obscene material has been shown or distributed or manufactured on premises does not constitute a prior restraint. Vernon's Ann.Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1.

4. Nuisance ⇐60

The penal code definition of "obscene" is referable to statute authorizing injunction against the commercial manufacture, distribution or exhibition of obscene material. Vernon's Ann.Civ.St. art. 4667(a)(3); V.T.C.A., Penal Code, § 43.21.

5. Nuisance ⇐80

Texas statute authorizing injunction against the commercial manufacture, distribution or exhibition of obscene material authorized restraint of such expression only as is not constitutionally protected and is prohibited by state law. Vernon's Ann.Civ.St. art. 4667(a)(3); V.T.C.A., Penal Code, §§ 43.21, 43.23; Rules of Civil Procedure, rule 683; U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐90.1(1)

The term "final" as used in United States Supreme Court decision requiring the assurance of a prompt final judicial determination whether material is unprotected after the imposition of any restraint prior to judicial review bears the sense of supervening and does not refer to whether the judicial action taken is itself subject to further judicial consideration and possible reversal. Vernon's Ann.Civ.St. art. 4667(a)(3); V.T.C.A., Penal Code, §§ 43.21, 43.23; Rules of Civil Procedure, rule 683; U.S.C.A.Const. Amend. 1.

7. Burglary ⇐12

Texas statute creating the felony offense of possessing a "criminal instrument" applies to such items as jimmies and safecracking tools; a film projector used to exhibit allegedly obscene films does not come within the statute. V.T.C.A., Penal Code, §§ 16.01, 43.23.

See publication Words and Phrases for other judicial constructions and definitions.

8. Courts ⇐508(7)

Seizure of theater's projector on ground that use of projector to exhibit allegedly obscene film rendered it a "criminal instrument," and arrest of theater operator who was under bond, provided substantial support for finding of harassment and prosecution in bad faith. V.T.C.A., Penal Code, § 16.01; Vernon's Ann.C.C.P. arts. 18.18, 23.03(a).

9. Obscenity ⇐5

A temporary ban on a film is permissible as long as there is the requirement of a prompt adversary hearing at the state's initiation. U.S.C.A.Const. Amend. 1.

10. Obscenity ⇐5

Adversary hearings, in the context of determining probable obscenity, need not be full-dress trial although the hearings must focus searchingly on the question of obscenity.

11. Obscenity ⇐5

Hearings conducted at theater at which allegedly obscene film was being

exhibited substantially approximated adversary hearings where theater operator was given notice and an opportunity to be heard, was advised that he could bring counsel and was invited to cross-examine the testifying officer and to introduce evidence.

12. Obscenity ⇐5

Theater operator cannot object to an insufficiency which is of his own making in a hearing to determine probable obscenity. V.T.C.A., Penal Code, §§ 16.01; Vernon's Ann.C.C.P. art. 18.18; U.S.C.A. Const. Amend. 1.

13. Federal Courts ⇐953

Since parties to action challenging statutes dealing with showing of obscene films and actions taken by local officials against motion picture theaters agreed to appeal from judgment of three-judge panel, even though the Supreme Court had vacated the panel's judgment for want of jurisdiction, inasmuch as costs would be determined with reference to what happened at the trial level, the managing judge of the three-judge court should hear the case on remand for determination and award of costs and attorney fees. 42 U.S.C.A. §§ 1981–1986, 1988.

14. Federal Civil Procedure ⇐2743

Court of Appeals has discretion to award costs and fees arising out of an appeal. 42 U.S.C.A. §§ 1981–1986, 1988.

15. Civil Rights ⇐13.17

County criminal district attorney and city's police chief were subject to awards of costs and attorney fees in suit for bad faith confiscation of theater's film projector even though case was pending when Congress revised Civil Rights Act by authorizing awards of legal expenses. 42 U.S.C.A. §§ 1981–1986, 1988.

16. Civil Rights ⇐13.17

The Attorney's Fees Award Act of 1976 was intended to allow fee awards in pending cases unless the awards were "manifestly unjust." 42 U.S.C.A. §§ 1981–1986, 1988.

17. Civil Rights ⇐13.8(1)

Although the Attorney's Fees Award Act of 1976 was intended to lift the veil of immunity from state and local governments to a limited degree, the Act does not change rules governing individual immunity for unconstitutional acts committed by a person acting in official capacity. 42 U.S.C.A. § 1988.

18. District and Prosecuting Attorneys ⇐10
Officers ⇐114

If the district court decides to award fees against persons in their individual capacities, it must respect the absolute immunity from money damages enjoyed by prosecutors as well as the qualified, good-faith immunity possessed by other government officials. 42 U.S.C.A. § 1988.

Appeals from the United States District Court for the Southern District of Texas.

Before THORNBERRY and GEE, Circuit Judges, and MARKEY,* Chief Judge.

GEE, Circuit Judge:

Presented with a number of requests for appointment of three-judge district courts to hear challenges to Texas statutes dealing with obscenity, the Chief Judge of this circuit consolidated all such

* Of the United States Court of Customs and Patent Appeals, sitting by designation.

cases for trial before one three-judge district court in Houston. The managing judge of that court attempted to simplify its Brobdingnagian task by choosing and setting for trial those three of the twenty consolidated cases which seemed to represent adequately the challenges of the remaining cases while presenting the fewest possible jurisdictional problems. We consider today the appeals from the district court's orders in two of these cases, 404 F.Supp. 33.[1]

I. KING ARTS THEATRE, INC. v. McCREA

The King Arts Theatre is an indoor, adults-only theater showing sexually explicit motion pictures in San Angelo, Texas. This lawsuit germinated from an apparently informal communication by the county attorney to the theater's landlord informing him that he would bring suit to enjoin future showings of pornographic films. The attorneys for the landlord then wrote to the owners of King Arts telling them of the impending suit and giving notice of termination of the theater's lease.[2] Shortly thereafter King Arts filed this suit seeking injunctive and declaratory relief from any action by the county attorney under the Texas statutes. The case was transferred to the three-judge court in Houston, and all parties agreed to stay their hands until the case could be decided.

That court concluded that *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), did not preclude granting the requested relief since no prosecution, civil or criminal, was pending. It also found, however, that prosecution under the Texas nuisance statutes would not cause irreparable injury and, so finding, declined to grant injunctive relief. It determined that Texas courts would construe the phrase "obscene material" in the applicable Texas nuisance statute[3] as the phrase was defined in Tex.Penal Code Ann. § 43.21 (Supp.1976), and upheld that definition against a claim of unconstitutional vagueness. Finally, it found that article 4667(a)(3), considered with articles 4665 and 4666 (which the court considered to be "companion statutes"), was unconstitutional on its face because it operated as an invalid prior restraint on the distribution of materials not yet judicially determined to be obscene. King Arts has not appealed from the denial of injunctive relief or the upholding of the Texas definition of obscenity.

[1] Our reading of the Texas nuisance statutes, articles 4664–67, dictates for us a narrower inquiry than that undertaken by the district court. Article 4666[4] provides for suits in the name of the State of Texas to enjoin a nuisance, and if an establishment is adjudged a nuisance under article 4666 there follows the rather draconian mandatory remedy of closing "said house . . . for one year from the date of said judgment," unless the owner provides a one- to five-thousand-dollar penal bond against future violations of the nuisance laws. The district court found that utilizing article 4666 to close a theater for showing obscene films "prevents the dissemination of that which is presumed to be legal and protected by the first amendment," that is, nonobscene films, as a concomitant of "preventing the dissemination of the unwholesome." 404 F.Supp. at 45. We agree that closing a theater under article 4666 for *all* uses for one year—even ameliorated by the provision for reopening under bond—would pose serious first amendment questions.[5] Such questions are not posed here, because we find article 4666's one-year closing remedy wholly inapplicable in actions such as this, since we read article 4667(a)(3)'s injunctive remedy as the exclusive procedure for abating obscene exhibitions as nuisances.

We note first that apparently no reported Texas cases have applied—or discussed the application of—the one-year abatement to premises used for manufacturing, distributing or exhibiting obscene material.[6] We thus write on a clean slate and must determine how Texas courts would interpret these nuisance statutes. Both article 4667 and articles 4664–66 have been on the Texas statute books since early in this century, but it was not until the 1973 amendment of article 4667 that obscenity was brought within the purview of either statute.

1. The third was not appealed.

2. The district court asserts that this letter stated that the lease termination was at the county attorney's suggestion. 404 F.Supp. at 38. As the letter appears in the record before us, we find no such representation; the letter states only that the termination was to avoid the inconvenience and embarrassment of joinder as a defendant in a suit to enjoin the showing of pornographic films.

3. Tex.Rev.Civ.Stat.Ann. art. 4667(a)(3) (Supp. 1976):

> (a) The habitual use . . . of any premises . . . for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof;
>
> . . . . . .
>
> (3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material . . . .

4. Whenever the Attorney General, or the district or county attorney has reliable information that such a nuisance exists, either of them shall file suit in the name of this State in the county where the nuisance is alleged to exist against whoever maintains such nuisance to abate and enjoin the same. If judgment be in favor of the State, then judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year from the date of said judgment, unless the defendants in said suit, or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is alleged to exist, in the penal sum of not less than one thousand nor more than five thousand dollars, with sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this law shall not be done or permitted to be done in said house. On violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and for the State in the county where such conditions are violated, all such suits to be brought by the district or county attorney of such county.

5. *Compare 106 Forsyth Corp. v. Bishop*, 362 F.Supp. 1389 (M.D.Ga.1972), *aff'd*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044, 95 S.Ct. 2660, 45 L.Ed.2d 696 (1975), finding no first amendment violation in the revocation of a movie theater's license for up to twelve months after a determination at a prior adversary hearing that obscene films had been shown, *and Grove Press, Inc. v. Flask*, 326 F.Supp. 574 (N.D.Ohio 1970) (three-judge court), *vacated and remanded for further consideration in light of intervening decisions*, 413 U.S. 902, 93 S.Ct. 3026, 37 L.Ed.2d 1013 (1973), upholding state nuisance statutes which provided for voiding of leases and closing of establishments for up to one year after a full adversary hearing and determination that obscene movies had been exhibited, *with Avon 42nd Street Corp. v. Myerson*, 352 F.Supp. 994, 998 (S.D.N.Y.1972) (dictum) ("To permit the suspension of operation of a theatre on the basis of a prior conviction even for obscenity, amounts to an unconstitutional suppression of protected freedom of expression.").

6. Indeed, we find no indication in the record that the county attorney contemplated any remedy other than an injunction against the showing of obscene movies. So far as we can tell, the question of the one-year abatement was introduced by King Arts' pleadings, not by the county attorney.

Article 4664[7] defines three types of establishments as "common nuisances," the proprietor of which is guilty of "maintaining a nuisance": gambling houses, houses of prostitution, and places where intoxicating liquors are kept [the latter now being construed primarily as referring to places where liquor law violations take place. *State v. Parker*, 147 Tex. 57, 212 S.W.2d 132, 133 (1948)]. The language of article 4666 appears to refer back to article 4664 to explain what constitutes a nuisance: "Such a nuisance," "such nuisance," "said nuisance," "the acts prohibited in this law." Reinforcing this construction is the fact that articles 4664–66 were enacted by one bill and as one law. Tex.Laws, 2d Called Sess. 1923, ch. 24 at 57–58, and in this original pre-compilation form the references from section 4 (now article 4666) to section 1's (now article 4664's) definition of "nuisance" were even more stark, including references to the "county where the *above* nuisance is alleged to exist," for example, and to a penal bond "conditioned that the *acts prohibited in section 1 of this Act* shall not be done . . ." With the 1923 recompilation of the Revised Civil Statutes, article 4667 came into being, combining several previous statutes providing for injunctive relief against gaming establishments, bawdy houses and "bucket shops," but it was placed (obviously) *after* the rearward-looking article 4666 with its one-year abatement remedy. Article 4667 did *not* denominate its various injunction-worthy activities as nuisances, so that an activity within the purview of article 4667 clearly was not subject to article 4666's one-year closing unless it also was an activity (i. e., gambling or prostitution) made a "common nuisance" by article 4664.

[2] The same 1973 amendment which brought the commercial manufacture, distribution or exhibition of obscene matter within the coverage of article 4667 also complicated the picture by inserting, for the first time, the word "nuisance" in article 4667:

> (a) The habitual use . . . of any premises, place or building or part thereof, for any of the following uses shall constitute a *public nuisance* . . . .

(emphasis added). But merely attaching the name "nuisance" to article 4667(a)'s list of enjoinable activities was not intended, we believe, to key in the remedies of article 4666. Had the legislature intended to apply the one-year closing sanction to pornographers' establishments, it could have more clearly signalled such an intent by adding to article 4664[8] appropriate language listing such obscenity-purveying establishments among the few "common nuisances" clearly subject to abatement under article 4666. Perhaps the legislature foresaw the constitutional implications of shutting a communication-oriented business to *all* forms of expression, and to

7. Any hotel, rooming house or boarding house, country club, garage, rent car stand or other place to which the public commonly resort for board or lodging or commonly congregate for business or pleasure, where intoxicating liquors are kept, possessed, sold, manufactured, bartered or given away, or where intoxicating liquors are furnished to minors or to students of any educational institution, or where persons habitually resort for the purpose of prostitution or to gamble as prohibited by the Penal Code, is hereby declared to be a common nuisance. Any person who knowingly maintains such a place is guilty of maintaining a nuisance.

8. Which was also amended in 1973. The 1973 amendments to both articles 4664 and 4667 were part of a much larger bill enacting a new Texas Penal Code.

avoid potential trenching upon the first amendment, chose to authorize only the lesser constraint of an injunction against future exhibitions of unprotected obscene matter[9] by making article 4667, rather than article 4666, applicable to obscenity distribution. Whatever the legislature's motive, we think that even after the 1973 amendments article 4666 still refers solely to the nuisances defined in article 4664 and therefore that the district court in passing on the Texas nuisance statutes unnecessarily considered the effect of a one-year shutdown not authorized by Texas law.[10]

[3–5] This feature aside, we think article 4667(a)(3)'s injunctive procedure basically sound in its application to establishments such as King Arts. The statute authorizes an injunction against the commercial manufacture, distribution or exhibition of *obscene* material only. Because the injunction follows, rather than precedes, a judicial determination that obscene material has been shown or distributed or manufactured on the premises and because its prohibitions can apply only to further dealings with obscene and unprotected material, it does not constitute a prior restraint. Were a Texas court to issue an overbroad injunction restricting nonobscene (and therefore protected) matter, it would exceed both its constitutional and its statutory authority. While we might not be willing to assume with appellants that every state trial court granting an injunction on the authority of article 4667(a)(3) will draw up a lengthy order specifically enumerating the explicit details of the conduct prohibited, neither will we predict overly broad injunctions affecting protected expression. As we have noted, the district court correctly looked to section 43.21 of the Texas Penal Code for the definition of "obscene" referable to article 4667(a)(3) and found that section 43.21's definition, as construed by Texas courts, met or exceeded constitutional requirements as set down in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). An injunction which infringed first amendment rights would therefore necessarily exceed the court's authority under article 4667(a)(3); state appellate courts presumably stand ready to overturn orders which contravene either state statutes or the federal constitution. And a proprietor enjoined by an order proper under article 4667(a)(3) is prohibited from doing only that which he could not lawfully do anyway, since Texas law prohibits him from commercially exhibiting, possessing for sale, or distributing obscene material. Tex.Penal Code Ann. § 43.23(a)(1) (1974). A lawful injunction subjects him to no further guesswork, in determining what is and is not prohibited, than he must already engage in merely to comply with Texas law.[11] In

9. *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

10. For the same reasons the district court's understandable concern about article 4665, which elevates proof that prohibited acts are committed in a place to the status of prima facie evidence that the proprietor knowingly permitted them to occur and permits proof that a house is such a nuisance by evidence of its general reputation, was similarly misplaced. Like article 4666, article 4665 seems to look to article 4664—speaking, for example, of "proof that any of *said prohibited acts* are committed in any of *said places*"—and was enacted contemporaneously with article 4664 as part of the same bill. Under our reading, article 4665 is unavailable in actions to enjoin the exhibition of obscene materials and need not be considered by us.

11. Under Texas law the injunctive order must "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained . . . ." Tex.R.Civ.P. 683.

short, as we read the Texas statutes, they authorize restraint of such expression only as is not constitutionally protected and is prohibited by state law. This is not the stuff of which first amendment violations are made.

Finally, we note that in concluding its opinion the court below expressed doubts about the validity of certain Texas procedural rules when applied in the context of obscenity.[12] Their defect is said to be a failure to provide for a prompt "final" judicial determination of whether matter is obscene or not *after* the issuance of temporary injunction, since a temporary injunction is by definition not a final order. This is said to be required by the Supreme Court's observation in *Freedman v. Maryland*, 380 U.S. 51, 58–59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), reiterated in *Southeastern Productions v. Conrad*, 420 U.S. 546, 560, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448 (1975), that where obscenity questions are to be dealt with:

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

(original emphasis). But we do not think this passage bears the sense which the court below sought to place upon it, for the context of *Freedman* and of *Conrad*, in which these words were spoken, is quite different from the present one.

[6] Under the Maryland scheme considered in *Freedman*, questioned material is drawn before the court only after and because of an earlier determination by an administrative board that it is obscene. The same was true in *Conrad*, a board having refused use of a municipal theater on grounds that a musical show was obscene. And the Supreme Court's concern, in the passages fixed on by the court below in this case, was that such matter should not be left to rest indefinitely in a state of provisional, administrative condemnation, that there should be a *final judicial* determination of its quality as obscene or not—as contrasted with the obtaining *tentative administrative* determination—within a short and definite period of time after its administrative interdiction. Thus the term "final" as used in *Freedman* and again in *Conrad* bears the sense of *supervening* and does not refer, as the lower court appears to have believed, and to whether the judicial action taken is itself subject to further judicial consideration and possible reversal.[13]

So understood, then, this passage from *Freedman* does not condemn or even

An order which enjoins the exhibition of obscene material, as the term is defined in the Penal Code, and provides no further guidelines is invalid under Texas Rule 683, wholly apart from first amendment considerations. *Richards v. State*, 497 S.W.2d 770, 778 (Tex.Civ. App.—Beaumont 1973, no writ).

12. As it happens, these rules—primarily Texas Rules of Civil Procedure 680 and 681—are copied, with minor textual changes not relevant here, from Federal Rule 65. This circumstance, while of course it does not render the Texas rules inviolate, does lend a certain extension and moment to the court's remarks expressing doubt about their propriety.

13. It is true that in *Freedman* the Court spoke of a "final judicial determination," though the context is a reference to "[a]ny restraint imposed in advance of" such a determination. 380 U.S. at 59, 85 S.Ct. at 739. But on the preceding page, the phrasing is "only a procedure requiring a judicial determination suffices to impose a valid final restraint." And on the page following, the phrase is merely "prompt judicial determination."

concern such procedures as those of Texas (and our) courts by which temporary injunctions are granted or refused pending final hearings on the merits. There need be no supervening judicial hearing following the initial determination within some special, fixed period of time because the initial determination (at hearing on temporary injunction) was itself a judicial one, and there is no administrative decision to supervene. In sum, we find article 4667(a)(3) and the Texas procedures constitutional and therefore REVERSE the judgment of the district court to the contrary.

II. DEXTER v. BUTLER

On June 24, 1974, a San Antonio police officer entered the Fiesta Theater, where the film "Deep Throat" was showing. After viewing the theater's fare, the officer requested an "adversary hearing" to determine the film's probable obscenity, and, within an hour, a hearing took place at the theater itself. Among those attending the proceeding was the theater's operator, Richard Dexter, who had been advised to attend with counsel. At the conclusion of the hearing, the presiding magistrate issued a search warrant authorizing seizure not only of the film but also of the theater's projector, which the warrant characterized as a "criminal instrument" under section 16.01 of the Texas Penal Code. The complaining officer then arrested Dexter, filing charges against him for the misdemeanor offense of commercial obscenity[14] and for the felony offense of possessing a criminal instrument. This scenario was reenacted three times in the next two weeks,[15] the only variation being that, on the last occasion, the person arrested was not Richard Dexter but Wayne Walker, a theater employee.

Dexter sued in federal court, seeking an injunction against Ted Butler, Bexar County's Criminal District Attorney, and Emil Peters, San Antonio's Police Chief. The district court ruled the confiscation of the theater's projector bad-faith harassment under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), because a film projector is clearly not a "criminal instrument" within the meaning of section 16.01, a device especially contrived for criminal purposes. The court also found bad faith in the repeated seizures of the theater's film; these were held to have contravened the Supreme Court's decision in *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973). Having made these determinations, the district judges enjoined all felony prosecutions against Dexter.

Simultaneous appeals were taken here and to the Supreme Court. The Court, concluding that the case had not warranted a three-judge panel because the district court had not questioned the constitutionality of any statute, vacated the lower court's judgment, allowing entry of a new decree and perfection of an appeal to this court. The parties later

14. Section 43.23 of the Texas Penal Code sets forth the offense of commercial obscenity as follows:

> (a) A person commits an offense if, knowing the content of the material:
>
> (1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any obscene material;
>
> * * * * * *
>
> (c) An offense under this section is a Class B misdemeanor unless committed under Subsection (a)(3) of this Section, in which event it is a Class A misdemeanor.

15. Arrests were made on June 24, June 28, July 2 and July 6, 1974.

agreed to appeal from the original judgment in order to save time.[16]

The district court granted relief in a matter ordinarily confined to state judicial processes. *See Younger v. Harris*, 401 U.S. at 44–45, 91 S.Ct. at 750–51. The appropriateness of that action depends upon whether appellants were guilty of "harassment or prosecutions . . . in bad faith without hope of obtaining a valid conviction." *Perez v. Ledesma*, 401 U.S. 82, 85, 91 S.Ct. 674, 677, 27 L.Ed.2d 701 (1971). In deciding this question we turn first to the seizure of Fiesta Theater's projector.

[7] Section 16.01 of the Texas Penal Code creates the felony offense of possessing a "criminal instrument" which the statute defines as "anything that is specially designed, made, or adapted for the commission of a crime." As the lower court noted, the statute obviously applies to such items as jimmies and safecracking tools, the possession of which unmistakably indicates that criminal conduct is afoot. The correctness of this interpretation is confirmed by the following portion of the "Practice Commentary" that accompanies section 16.01:

> [The statute] aims at terminating incipient criminal activity, the existence of which is indicated by conduct involving a "criminal instrument." The mere possession or manufacture of things specially designed for the purpose of accomplishing a criminal objective is strong evidence of criminal intent. The instrument must be *specially* designed, made, or adapted for the commission of an offense, however; things frequently used in a crime, but which have common, lawful uses, are excluded from the purview of Section 16.01 because possession of such things alone, is conduct too ambiguous for the imposition of the criminal sanction.

(emphasis in original). Relying on the above commentary,[17] the district court read section 16.01 as clearly inapplicable to film projectors, which accommodate lawful movies as easily as obscene ones. Appellants respond that a projector has no lawful use when it carries a reel containing an obscene film. With this argument we cannot agree. Section 16.01 punishes criminal intent, and it is possession of an obscene movie that evinces an intent to display illegal material; whether one also has a projector is irrelevant. This point is underscored by article 18.18 of the Texas Code of Criminal Procedure, which dictates destruction of any "criminal instrument," as that term is defined in the Penal Code. This provision has its purpose in preventing criminal acts, a goal hardly advanced by junking theater projectors.

[8] The seizure of Fiesta Theater's projector provides substantial support for the district court's finding of harassment and prosecution in bad faith. The multiplicity of the seizures dispels the likelihood of an honest mistake to the

16. Appellants have challenged the composition of the three-judge panel because the judge who first heard the request for injunctive relief was not included on the panel as 28 U.S.C. § 2284 requires. This question was mooted when the Supreme Court vacated the three-judge court's decision and the parties agreed to appeal from the existing judgment rather than waiting for a new decree.

17. Appellants have objected that the Practice Commentary is entitled to little weight since it lacks the status of law. The objection would have more force if the commentary did more than restate the obvious meaning of § 16.01 and if the Texas Court of Criminal Appeals had not recently approved of the manner in which the lower court interpreted the statute. *See Fronatt v. State*, 543 S.W.2d 140 (Tex.Crim.App.1976).

same extent that the language of section 16.01 must have dispelled any hope of obtaining Dexter's conviction. What makes this case an even more compelling one is the district attorney's failure to seek grand jury indictments on the felony charges against Dexter, which has frustrated prompt adjudication of the propriety of state efforts to curb speech.[18] *See Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). This prosecutorial inaction also implies that law enforcement officials recognized they were acting illegally and knew they could not obtain convictions on the felony charges.

Appellants have attempted to explain their neglect in seeking grand jury indictments by blaming the district court's pretrial restraining order. This seemingly interminable order, which we can hardly call "temporary" since it was successively extended for 339 days,[19] originally enjoined Butler and Peters "from further seizures of the film 'Deep Throat' at the Fiesta Theater, San Antonio, Texas, and from arresting plaintiff [Dexter] or employees of said theater, for so long as 'Deep Throat' is showing at the Fiesta Theater." Appellants argue that securing indictments against Dexter would necessarily have entailed arresting him in violation of the court's restraining order because (1) under Texas law a capias must issue upon a grand jury indictment, and (2) Dexter's absence from the state required his arrest and extradition for trial. But the obvious design of the original restraining order was to prevent further efforts by law enforcement officials to halt the exhibition of "Deep Throat." Read in context, the order's prohibition against arresting Dexter meant that the police were to cease their raids upon the theater; it did not prevent the district attorney from taking whatever actions were necessary to carry out Dexter's prosecution. This interpretation of the order is borne out by the transcript of a conference that occurred on August 12, 1974, between both parties to this suit and Judge Singleton, the managing judge of the district court. In that conference Judge Singleton informed both the defense and the prosecution that the court would not enjoin prosecution of pending state cases.[20] This was reiterated shortly thereafter in the trial court's order of September 6, which superseded its original restraining order. The latter order retained the injunction against further

18. Appellants cite Dexter's motions for continuance in his misdemeanor trial as evidence that he was not anxious for a determination of his guilt or innocence in state court. We fail to see how these dilatory motions prove that Dexter would not have been quick to resist felony charges, something we will never know because of the district attorney's failure to obtain felony indictments.

19. The first restraining order, quoted in the text, was issued by Judge Singleton following an ex parte hearing conducted on July 29, 1974. Twelve days later the order was extended, and in an August 12 conference Judge Singleton announced that the restraining order would be successively extended, regardless of whether additional, written orders were decreed. Finally, on September 6, 1974, the court superseded its original restraining order with another one, which was to remain in effect pending disposition of the case.

20. The following conversation took place at the hearing:

> MR. BURRIS: Your honor, could I ask one question? Now, your prior temporary restraining order has not been in such language as to restrain us from prosecuting our present criminal cases. It's been an injunction against further arrests and seizures of film.
>
> THE COURT: I don't think I am going to enjoin you from prosecuting these pending criminal cases . . . .

arrests of Dexter but expressly provided that "no pending state criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases."

Even had the district attorney been in doubt about the scope of the original restraining order, we would still affirm the three-judge panel's finding of bad faith because Dexter's indictment would not have necessitated his arrest. Article 23.03(a) of the Texas Code of Criminal Procedure clearly makes issuance of a capias unnecessary when the indictee is under bond, as Dexter had been ever since his first arrest.[21] As for Dexter's alleged absence from the state, we fail to see how his flight would have prevented the district attorney from obtaining indictments against him, although it may have precluded an immediate trial. In any event, appellants have offered so little proof of Dexter's alleged out-of-state excursion that we cannot determine its duration or even whether it in fact occurred.[22] All we do know is that Dexter was arrested during the third raid on the Fiesta Theater and that he personally appeared at the trial of his misdemeanor charges, which began on November 11, 1974, four days before the district court heard arguments in this case. Dexter's whereabouts between these two dates are not shown with any clarity. Moreover, the record makes it appear very possible that the district attorney's office first received information about Dexter's absence after it had already learned the district court did not intend to enjoin prosecution of charges pending against Dexter.[23] If so, Dexter's flight could not have weighed in the decision whether to proceed with the prosecution of his felony charges.

The trial court's finding of bad faith harassment is further corroborated by the repeated seizings of the film "Deep Throat." Assuming for the moment that appellants could have temporarily barred the film's exhibition following the initial adversary hearing held at the theater, we fail to see why the district attorney did not order a single proceeding, the stated purpose of which was to determine whether "Deep Throat" should be

21. Art. 23.03 of the Code of Criminal Procedure reads as follows:

> (a) A capias shall be immediately issued by the district clerk upon each indictment for felony presented, or upon the request of the attorney representing the State, the summons shall be issued by the district clerk, and shall be delivered by the clerk or mailed to the sheriff of the county where the defendant resides or is to be found. A capias or a summons need not issue for a defendant in custody or under bond.

22. Appellants offer three items of evidence to prove that Dexter fled the state. First, they adduce an affidavit of the Chief of the Special Crimes Division of the Bexar County District Attorney's Office. This affidavit merely mentions a statement by Dexter's attorney that his client was out of the state. Second, appellants produce the transcript from a hearing on one of Dexter's continuance motions in his misdemeanor trial. In that hearing Dexter's newly retained counsel stated he did not know where his client was. Third, and least persuasive, appellants advert to that portion of the transcript from the August 12 conference with Judge Singleton in which defense counsel, Mr. Burris, describes Dexter as a "fugitive out [sic] Memphis, Tennessee."

23. Dexter's misdemeanor trial was originally set for September 16, 1974. From the record, it appears that the district attorney's office first concluded that Dexter was absent from the state when a summons for his appearance at the misdemeanor trial was returned unserved. This suggests that the prosecutor first believed that Dexter had fled the state long after the August 12 pretrial conference in which Judge Singleton advised that the restraining order did not prevent prosecution of pending cases, and perhaps even after the order of September 6, which removed any doubt on that score.

banned until a jury determination of the film's obscenity. Instead, appellants repeatedly confiscated the film, following hearings whose only avowed purpose was to decide whether police could seize evidence of a reported crime and arrest a reported misdemeanant. This conduct strongly suggests an intent to harass. *Cf. Tyrone, Inc. v. Wilkinson*, 410 F.2d 639, 642 (4th Cir.), *cert. denied*, 396 U.S. 985, 90 S.Ct. 478, 24 L.Ed.2d 449 (1969). *But see Inland Empire, Inc. v. Morton*, 365 F.Supp. 1014 (C.D.Cal.1973).[24]

Having found ample grounds for affirming the trial court's holding, we need not examine the question whether appellants' repeated seizures of Fiesta Theater's film contravened the Supreme Court's decision in *Heller v. New York*.[25] Nonetheless, since this case presents issues representative of the twenty cases consolidated before the three-judge court, we believe a brief discussion is appropriate.

Heller contains the Supreme Court's latest discussion of the necessity of holding an adversary hearing before seizing an allegedly obscene film.[26] The crux of the *Heller* opinion is this statement:

24. The district court in *Inland Empire* refused to enjoin repeated seizure of the film "Deep Throat," noting that each showing of the motion picture was a separate offense "[j]ust as a new offense subject to arrest and seizure on a valid warrant is committed every day when a putative Defendant purchases other kinds of contraband such as heroin, cocaine or other narcotics, and then possesses, distributes and sells them." 365 F.Supp. at 1017. The seizures at issue in *Inland Empire* were made pursuant to search warrants; adversary hearings did not precede the issuance of the warrants nor did they promptly follow.

> In disagreeing with the analysis of the court in *Inland Empire*, we observe the following statement:
>
> > It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband.
>
> *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211–12, 84 S.Ct. 1723, 1726, 12 L.Ed.2d 809 (1964).

25. 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973).

26. Twice the Supreme Court has declined to decide whether an adversary hearing must precede the seizure of obscene material pursuant to a search warrant. *See McGrew v. City of Jackson*, 401 U.S. 987, 91 S.Ct. 1221, 28 L.Ed.2d 525 (1971), *vacating* 307 F.Supp. 754 (S.D.Miss.1970) (holding pre-seizure hearing unnecessary); *Hosey v. City of Jackson*, 401 U.S. 987, 91 S.Ct. 1221, 28 L.Ed.2d 525 (1971), *vacating* 309 F.Supp. 527 (S.D.Miss.1970) (holding pre-seizure hearing unnecessary). Both cases were vacated and remanded in light of *Younger v. Harris, supra*, and *Samuels v. Mackel*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971).

> In yet another case the Supreme Court avoided deciding whether the first amendment permits issuance of an ex parte temporary injunction against the sale or display of obscene material when an adversary hearing is required within two days. *ABC Books, Inc. v. Benson*, 401 U.S. 988, 91 S.Ct. 1228, 28 L.Ed.2d 525 (1971), *vacating* 315 F.Supp. 695 (M.D.Tenn.1970) (holding injunction proper). This case was also vacated and remanded in light of *Younger v. Harris, supra*, and *Samuels v. Mackel, supra*. The Court later vacated this case again, 413 U.S. 904, 93 S.Ct. 3028, 37 L.Ed.2d 1015 (1973), this time in light of *Heller v. New York, supra*, and its companion cases: *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); *Kaplan v. California*, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); *United States v. Twelve 200-foot Reels of Super 8mm Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); *United States v. Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973); *Alexander v. Virginia*, 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993 (1973).

> If such a seizure [of film solely for the purpose of preserving evidence] is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copies so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned.

413 U.S. at 493–94, 93 S.Ct. at 2795 (footnotes omitted). Thus, the Court in *Heller* held that an adversary hearing need not precede the seizure of a film, if the seizure will not significantly interfere with the film's exhibition. The district court in this case concluded, correctly, that appellants' persistent seizures of Fiesta Theater's film were a significant restraint on the continued exhibition of "Deep Throat" and then ruled that a course of seizures such as this was invalid absent a prior adversary hearing. Since the lower court found that the probable cause hearings conducted at the theater were not "adversary hearings," it therefore declared the seizures unlawful.

[9] Language in the district court's opinion suggests it believed that a film cannot be banned even temporarily before a trial on the merits.[27] If this is what the court meant to say, we do not agree, for in *Heller* the Court clearly contemplated pretrial adversary hearings. *See* 413 U.S. at 490, 93 S.Ct. at 2793–94. Moreover, in the recently affirmed case of *Freedman v. Maryland, supra*,[28] the Supreme Court held that a film's exhibition can be temporarily restrained even without a prior adversary hearing if specific procedural safeguards are observed. Since the *Heller* Court discussed *Freedman* approvingly,[29] we must conclude that a temporary ban on a film is permissible as long as there is the requirement of a prompt adversary hearing at the state's initiation.[30] Two other

27. In commenting upon the sufficiency of the probable cause hearings conducted at the Fiesta Theater, the court stated:

> The fact that the magistrate notified the attorney and gave him the opportunity to appear at a "hearing"—which consisted of nothing more than the testimony of the police officer and the viewing of the film [sic] does not transform San Antonio's procedures into an adversary hearing, *the results of which would have the force and effect of a final adjudication of obscenity.*

404 F.Supp. at 49 (emphasis added).

28. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

29. 413 U.S. at 489–90, 93 S.Ct. at 2793. *See also McKinney v. Alabama*, in which the Court cited *Freedman* and *Heller* in tandem, describing them as cases establishing procedures sensitive to first amendment freedoms. 424 U.S. 669, 673, 96 S.Ct. 1189, 1193, 47 L.Ed.2d 387 (1976).

30. Despite *Freedman v. Maryland*, it is still theoretically possible to argue that an adversary hearing must *always* precede the imposition of even a temporary ban on a film. The *Freedman* case can be distinguished as involving a temporary restraint imposed before a film is exhibited; when a film is seized during its exhibition, one can contend that a greater procedural protection should be provided since greater disruption of a theater's operations ensues. On several occasions the Supreme Court has given weight to business considerations in determining the validity of procedures by which film exhibitions are stopped. *See Roaden v. Kentucky*, 413 U.S. 496, 503–04, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757 (1973). Specifically has the Court noted a theater operator's need for planning a schedule of his feature films. *See Freedman v. Maryland*, 380 U.S. at 61, 85 S.Ct. at 740. Nevertheless, this argument seems foreclosed by the *Heller* Court's express approval of *Freedman* in the context of discussing procedures that must be followed when law enforcement officials seize films then being exhibited.

> A further argument can be made supporting the proposition that adversary hearings must be held before any restraint is imposed on a film's exhibition. In *A Quantity of Copies of Books v. Kansas, supra*, the Court held that a judicial determination of obscenity in an adversary proceeding is necessary before officials can seize large quantities of books for the sole purpose of destroying them. *See also Marcus v. Search Warrants of Property*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). In *Heller v. New York* the Court, through Chief Justice Burger, reaffirmed *A Quantity of Books*, noting its applicability in any case involving a "large-scale seizure of books, films, or other materials presumptively protected under the First Amendment." 413 U.S. at 491, 93 S.Ct. at 2794. In the case that next appears in Volume 413 of the United States Reports, *Roaden v. Kentucky, supra*, the Chief Justice, again speaking for the Court, stated that "[s]eizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a book store." 413 U.S. at 504, 93 S.Ct. at 2801. Juxtaposing these passages, one can argue that *A Quantity of Books* applies to any restraint placed upon a film then being shown. What this argument fails to take into account is the *Heller* Court's emphasis on the purpose of the seizures in both *A Quantity of Books* and *Marcus v. Search Warrants*—namely, the destruction of the seized material. A seizure for this purpose would require a prior adversary hearing, since a hearing held after the material's destruction would be useless. The same is not true of a hearing promptly following the imposition of a temporary restraint on a film's exhibition. *Cf. United States v. Pryba*, 163 U.S.App.D.C. 389, 502 F.2d 391, 405 (1974), *cert. denied*, 419 U.S. 1127, 95 S.Ct. 815, 42 L.Ed.2d 828 (1975) (noting that seizure "solely for the purpose of destruction" demands greater procedural safeguards than does seizure "with a view to absolute suppression"); *G. I. Distributors, Inc. v. Murphy*, 490 F.2d 1167 (2d Cir. 1973), cert. denied, 416 U.S. 939, 94 S.Ct. 1941, 40 L.Ed.2d 290 (1974) (upholding prehearing seizure of 19,000 copies of publications pending adversary hearing on the following morning).

circuits agree with our reading of *Heller*. In *United States v. Pryba*, 163 U.S.App. D.C. 389, 502 F.2d 391 (1974), *cert. denied*, 419 U.S. 1127, 95 S.Ct. 815, 42 L.Ed.2d 828 (1975), the D.C. Circuit stated that pre-seizure hearings are necessary when large quantities of allegedly obscene material are confiscated for the sole purpose of destruction but expressly sanctioned post-seizure hearings in other cases. 502 F.2d at 405. And in *G. I. Distributors, Inc. v. Murphy*, 490 F.2d 1167 (2d Cir. 1973), *cert. denied*, 416 U.S. 939, 94 S.Ct. 1941, 40 L.Ed.2d 290 (1974), the Second Circuit, speaking through Judge Lumbard, upheld a prehearing seizure of 19,000 copies of publications because the state had conducted an adversary hearing on the morning following the confiscation.[31] Judge Lumbard specifically rejected the argument that the *Heller* opinion "condemned all prehearing seizures, except those in which a limited number of copies of the allegedly obscene materials are seized solely for evidentiary purposes." 490 F.2d at 1168.

[10–12] Finally, we turn to the lower court's ruling that the adversary hearings afforded Dexter were constitutionally insufficient. In response to this finding, we wish to restate established law. Adversary hearings, in the context of determining probable obscenity, need not be full-dress trials, *see Tyrone, Inc. v. Wilkinson*, 410 F.2d at 642; *Sims v. Dial*, 350 F.Supp. 747 (W.D.Tex.1972);

31. The *Murphy* case reinstated the court's former decision, which the Supreme Court had vacated and remanded in light of *Heller v. New York* and its companion cases. *See* 413 U.S. 913, 93 S.Ct. 3056, 37 L.Ed.2d 1033 (1973).

Miske v. Spicola, 314 F.Supp. 962 (M.D. Fla.1969), although it is now axiomatic that hearings must "focus searchingly on the question of obscenity." *Marcus v. Search Warrants*, 367 U.S. 717, 737, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961). The Supreme Court's decision in *Heller v. New York* gives perhaps more concrete guidance by likening an adversary proceeding to a hearing on a pretrial motion, 413 U.S. at 490–91, 93 S.Ct. at 2794, which implies notice and an opportunity to be heard as minimum requirements. We do not understand the *Heller* Court, however, to prescribe identical procedures for adversary hearings on both pretrial motions and questions of probable obscenity. One difference between these types of hearings is that a proceeding to determine probable obscenity may properly be held on rather short notice, since those who exhibit films of questionable legality should be prepared to defend their offerings within a relatively brief period of time. *Braha v. Texas*, 319 F.Supp. 1331 (W.D.Tex. 1970). In viewing these considerations, we believe that the hearings conducted at the Fiesta Theater substantially approximated adversary hearings, although we do not reach the precise factual question of their sufficiency. Dexter was given notice [32] and an opportunity to be heard on the question of obscenity. He was advised that he could bring counsel to the proceedings and, during the July 28 hearing, was even encouraged to do so. Dexter was also invited to cross-examine the testifying officer and to introduce evidence. At least one reason why the adversary hearings appear to have been rather summary is that Dexter did not fully participate in them. Obviously, a theater operator cannot object to an insufficiency which is of his own making in a hearing. *See United States v. Pryba*, 502 F.2d at 406. *Cf. Heller v. New York*, 413 U.S. at 490–91, 93 S.Ct. at 2794.

The judgment of the district court is AFFIRMED.

III. ATTORNEYS' FEES

[13, 14] Both Dexter and King Arts seek a remand for a determination and award of costs and attorneys' fees, the latter assessment being authorized by the Attorney's Fees Award Act of 1976, Pub.L. 94–559, 90 Stat. 2641 (1976), which revised 42 U.S.C. § 1988 to permit awards of legal expenses to prevailing parties in suits brought under the Civil Rights Acts, 42 U.S.C. §§ 1981–86.[33] King Arts has not prevailed and is, of course, not entitled to such relief. We remand Dexter's case with directions for the trial court [34] to set reasonable attorneys' fees in accordance with the standards set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and reaffirmed in *Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977). Although we have discretion to award costs and fees arising out of an appeal to this court, *see Moten v. Bricklayers International Union*, 177 U.S.App. D.C. 77, 543 F.2d 224, 240 (1976); *Globe Life & Accident Insurance Co.*, 402 F.2d 295 (5th Cir. 1968), considerations of judicial economy call for the district court to determine the total award in this case, *see Panior v. Iberville Parish School Board*, 543 F.2d 1117, 1120 (5th Cir. 1976), especially since an evidentiary hearing may be necessary, *see Moten v. Bricklayers International Union, supra* at 240.

[15–18] Appellants Butler and Peters contend that they are not subject to such awards because this case was pending when Congress revised section 1988, but we have disposed of that contention in *Rainey v. Jackson State College, supra*. As the *Rainey* court observed, the legislative history of the Attorney's Fees Act makes plain Congress' intent to allow fee awards in pending cases unless the awards are "manifestly unjust." [35] 551 F.2d at 676. We do not consider them to be so in this case.

A more difficult question is, against whom can the district court direct its award? Again, we consult the legislative history that accompanies Congress' revision of section 1988:

> As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases [inter alia, cases brought under the Civil Rights Acts, 42 U.S.C. §§ 1980–86] are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity,[7] from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S.Rep. No. 94–1011, 94th Cong., 2d Sess. 5 & n. 7, *reprinted in* [1976] U.S.Code Cong. & Ad.News pp. 5908, 5913 (footnote omitted). Although, as the above passage makes clear, Congress intended to lift the veil of immunity from state and local governments to this limited degree,[36] the last sentence in the passage makes it equally clear that the Attor-

32. Dexter was given notice one-half hour before the hearing that took place on June 28 and one hour before the July 2 proceeding. On the first occasion the presiding magistrate expressed willingness to delay the hearing if Dexter so desired. We do not determine the factual question whether Dexter received adequate notice on either of these dates.

33. The relevant portion of revised § 1988 reads as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

34. Since the parties agreed to appeal from the district court judgment, and since costs must be determined with reference to what happened at the trial level, we believe that the managing judge of the three-judge court should hear this case on remand, even though the Supreme Court vacated the panel's judgment for want of jurisdiction.

35. The House Report to the Act stated that, "[i]n accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases." H.R.Rep. No. 94–1558, 94th Cong., 2d Sess. 4, n. 6 (1976). The legislation's applicability to pending cases was also noted during the floor debates. *See* 122 Cong. Rec. S17,052 (daily ed. Sept. 29, 1976) (remarks of Sen. Abourezk); 122 Cong. Rec. H12,155 (daily ed. Oct. 1, 1976) (remarks of Rep. Anderson); 122 Cong. Rec. H12,160 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan); 122 Cong. Rec. H12,166 (daily ed. Oct. 1, 1976) (remarks of Rep. Ashbrook).

36. Cases so holding have relied on Congress' power under the enforcement clause of the fourteenth amendment as construed in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). *See Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977); *Rodrigues v. Jimenez*, 551 F.2d 877 (1st Cir. 1977); *Rainey v. Jackson State College, supra*. *But see Skehan v. Board of Trustees*, — F.Supp. — (M.D.Pa.1977) (holding that the Attorney's Fee Award Act does not retract state immunity with sufficiently express language).

7. Proof that an official had acted in bad faith could also render him liable for fees in his individual capacity, under the traditional bad faith standard recognized by the Supreme Court in *Alyeska [Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)]. See *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974); *Doe v. Poelker*, 515 F.2d 541 (8th Cir. 1975).

ney's Fees Award Act does not change judicially established rules governing individual immunity for unconstitutional acts committed by a person acting in official capacity. Thus, if the district court decides to award fees against persons in their individual capacities, it must respect the absolute immunity from money damages enjoyed by prosecutors, *see Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), as well as the qualified, good-faith immunity possessed by other government officials, *see Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheur v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Consequently, any award of fees against individuals implicated in this case may require a hearing by the district court to develop facts not contained in the record, such as the scope and nature of the prosecutor's actions.[37] Likewise, awarding fees against city and state governments may require a hearing to determine such facts as whether city police were operating under the orders of state officials.

Accordingly, the lower court's judgment in *King Arts* is REVERSED, and decision is here RENDERED in accordance with our opinion. In *Butler* we AFFIRM and REMAND for further proceedings consistent with the above instructions.

THORNBERRY, Circuit Judge, dissenting in part, concurring in part:

In Part I of its opinion, the majority avoids what it admits to be "serious first amendment questions" by creating legislative intent from non-existent legislative history and by taking an abstruse view of relevant Supreme Court cases. Because a plain reading of the applicable Texas statutes and of those cases calls for a result contrary to that reached by the majority, I respectfully dissent. Moreover, while I concur in the result reached in Part II of the opinion, I cannot subscribe to the majority's use of a judicial shotgun when a small-caliber rifle would have sufficed.[1]

Taking the two portions in reverse order, I agree with the majority that bad-faith harassment in indeed "ample grounds for affirming the trial court's holding" in *Dexter v. Butler*. *Ante*, slip opinion at 6222, at ——. I would go no further, simply because such an excursion requires the Court to "decide" issues not essential to the disposition of the case before it.[2]

Part I of the opinion, however, necessitates more elaborate discussion. Article 4666 of the Texas statutes provides that upon "reliable information" that a nuisance exists, the attorney general, district attorney, or county attorney shall bring suit in the name of the State to abate or enjoin the nuisance. If the State is successful, there follows, as the majority aptly describes it, the "rather draconian remedy" of closing the premises for one year, unless the owner posts a penal bond of not less than $1,000 or

37. The Supreme Court has not resolved the thorny question whether prosecutors enjoy absolute immunity for acts other than initiating and pursuing a prosecution. *See Imbler v. Pachtman*, 424 U.S. at 430, 96 S.Ct. at 995.

1. At this point I should add that I concur in Part III of the opinion, although in my view King Arts also is entitled to a remand for a determination of attorneys' fees.

2. The majority as much as concedes that its discussion of the adversary hearing question is dictum when it states that "we do not reach the precise factual question of [the] sufficiency [of the hearing]." *Ante*, slip opinion at 6225, at ——.

more than $5,000 against future nuisance law violations. Article 4667, as amended in 1973, defines the commercial manufacture, distribution or exhibition of obscene material as a "public nuisance" and also sets forth a list of other nuisances, including gambling, prostitution, and bull fighting. The statute further provides that such activities "shall be enjoined at the suit of either the State or any citizen thereof."

In reversing the district court in *King Arts Theatre, Inc. v. McCrea*, the majority concludes that the one-year closing remedy provided in Article 4666 is inapplicable to obscenity and that the injunctive remedy under Article 4667 is "the exclusive procedure for abating obscene exhibitions as nuisances." *Ante*, slip opinion at 6214, at ——. This strained interpretation ignores the plain language of the two statutes, and the majority is forced to support its conclusion with suppositions about what the Legislature *may* have intended.[3]

In my view, Articles 4666 and 4667, taken together, allow the state to close, for one year, a theatre that has exhibited obscene films. Unless the bond is posted, the showing of *any* motion picture is punishable by contempt of court; thus, future conduct—which may fall within the purview of the First Amendment—is absolutely prohibited after a finding of undesirable and unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Of course, the theatre owner may post the bond and show films, but he forfeits that bond if one of the films he has selected is deemed obscene. The line between obscenity and protected speech is an extremely fine one, so fine that it is "dim and uncertain." *Bantam Books v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). As Justice Black pointed out:

> [N]o person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of "obscenity."

Ginzburg v. United States, 383 U.S. 463, 480–81, 86 S.Ct. 942, 952, 16 L.Ed.2d 31 (1966) (Black, J., dissenting). This particular dilemma has led Justice Brennan to observe:

> The essence of our problem in the obscenity area is that we have been unable to provide "sensitive tools" to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into suppression of the latter.

Paris Adult Theatre v. Slaton, 413 U.S. 49, 79–80, 93 S.Ct. 2628, 2645, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting). Few of us, perhaps only Justice Stewart and Kurt Vonnegut's fictional Senator Rosewater,[4] can escape from this defini-

3. For example, the majority states that "[p]erhaps the legislature foresaw the constitutional implications . . . and to avoid potential trenching upon the first amendment, chose to authorize only the lesser constraint of an injunction against future exhibitions of unprotected obscene matter . . . ." *Ante*, slip opinion at 6215–6216, at ——. This is nothing more than conjecture, for as anyone familiar with Texas government is acutely aware, there is no such thing as a "legislative history" for acts of the legislature.

4. Justice Stewart, of course, knows obscenity when he sees it. *Jacobellis v. Ohio*, 378 U.S. 184, 196–97, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring). Senator Rosewater's primary accomplishment was a statute making the publication or possession

tional quagmire, and this statutory scheme obviously encourages a theatre owner to steer wide of the danger zone by avoiding borderline films that are nonetheless protected under the First Amendment. This is self-censorship, a particularly subtle and most insidious form of censorship. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

Even more troubling is the majority's conclusion that the injunctive procedure contained in Article 4667 satisfies the requirements of *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), reaffirmed in *Southeastern Productions v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). The essence of these cases, as the district court pointed out, is that initial suppression of allegedly obscene material is permissible only for a brief, fixed period of time until a judicial determination is made and that final suppression is allowable only after a judicial determination of obscenity in an adversary context. The Texas injunction procedures, which would apply to an action brought under Article 4667, do not provide for a short, fixed period of time in which a final determination of obscenity can be made and are thus inadequate under *Freedman*. As the district court wrote:

> Pursuant to [Rules 680–693a of the Texas Rules of Civil Procedure], the state could obtain a temporary restraining order lasting up to ten days, ex parte. As soon as possible, within that ten days, however, a hearing on a temporary injunction is obtainable. The temporary injunction is not a final adjudication on the merits but, once it is obtained, there is no provision for treating the [obscenity] case any differently from any other civil case. The lack of a provision for a swift final adjudication on the obscenity question raises serious doubts of the constitutional usability of the injunction process in Texas for an obscenity situation.

404 F.Supp. at 46.

The majority attempts to distinguish this process from *Freedman* by labeling *Freedman* as an "administrative" case in which the Court was dealing with a "tentative administrative determination." That is a distinction without a difference, for the Court's overriding concern in *Freedman* was the evil caused by the state's indefinite suppression of potentially protected speech without a judicial determination of whether the material is obscene. Here the evil lies in the fact that, under Texas procedure, the temporary injunction is tentative—not a ruling on the merits—and *Freedman* requires procedural safeguards that include, *inter alia*, the assurance of prompt judicial review on the merits.

Because I would affirm the district court's holding that the statutory scheme embodied in Articles 4666 and 4667 are unconstitutional insofar as they concern obscenity, I respectfully dissent from Part I of the majority opinion. I concur in the result reached in Part II, and, with the exception stated in footnote 1 of this opinion, I concur in Part III.

of obscene materials a federal offense. The statute, Vonnegut wrote, "was a masterpiece because it actually defined obscenity." The definition: "Obscenity is any picture or phonograph record or any written matter calling attention to reproductive organs, bodily discharges, or bodily hair." K. Vonnegut, God Bless You, Mr. Rosewater 85 (Delta ed. 1965).

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNIVERSAL AMUSEMENT CO., INC., et al.,

v.

Carol VANCE et al.

KING ARTS THEATRE, INC., Plaintiff-Appellee,

v.

George E. McCREA et al., Defendants,

the State of Texas, Defendant-Appellant.

No. 75–4312.

United States Court of Appeals, Fifth Circuit.

Dec. 18, 1978.

Three cases involving challenges to Texas statutes relating to obscenity were consolidated, and a three-judge District Court for the Southern District of Texas, John V. Singleton, Jr., J., 404 F.Supp. 33, held, inter alia, that the Texas statutes, construed together, amounted to an unconstitutional prior restraint on the distribution of materials not yet judicially determined to be obscene. The State of Texas appealed with respect to two cases, and a panel of the Court of Appeals, 559 F.2d 1286, reversed and rendered in one case and affirmed and remanded in the other case. Thereafter, the cases were ordered reheard en banc and the Court of Appeals, en banc, Thornberry, Circuit Judge, held that: (1) the appeal was properly before the Court; (2) the Texas statute which provides that an establishment adjudged a nuisance may be ordered closed for one year was inapplicable to obscenity; (3) the Texas statute which provides that the use of any premises for the commercial manufacturing, distribution or exhibition of obscene material constitutes a public nuisance subject to injunction was unconstitutional insofar as it authorized injunctions against the future exhibition of unnamed films; (4) the Texas statute was also unconstitutional by reason of lacking required procedural safeguards, including a provision for prompt and final adjudication on the merits and (6) it was appropriate to remand to district court for a determination and award of costs and attorney fees.

Judgment of the panel of the Court of Appeals reversed and judgment of the District Court affirmed.

Gee, Circuit Judge, dissented in part and filed opinion in which Brown, Chief Judge, and Coleman, Ainsworth, Tjoflat and Vance, Circuit Judges, joined.

1. Federal Courts ⇐1142

Because appeal was from grant of declaratory relief alone, the United States Supreme Court was without jurisdiction to hear a direct appeal by the State of Texas from three-judge district court's judgment that Texas nuisance statute, as applied to materials not yet judicially determined to be obscene, amounted to an unconstitutional prior restraint; therefore, appeal was properly before the Court of Appeals. 28 U.S.C.A. § 1253; U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. arts. 4664, 4666.

2. Federal Courts ⇐612

In view of fact that question of *Younger* abstention is nonjurisdictional, question was not properly before the Court of Appeals where it was not raised before district court.

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APPENDIX II

3. Constitutional Law ⇐90.1(1)

While obscenity is not protected by the First Amendment, state regulation must not be permitted to impinge upon speech that matters. U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐82(6)

Corporate activities can clearly come within the First Amendment. U.S.C.A. Const. Amend. 1.

5. Constitutional Law ⇐90.1(6)

Entertainment as well as news enjoys First Amendment protection. U.S. C.A.Const. Amend. 1.

6. Constitutional Law ⇐90.1(6)

Motion pictures are covered by the First Amendment; indeed, a film carries with it a presumption of First Amendment protection. U.S.C.A.Const. Amend. 1.

7. Constitutional Law ⇐90.1(4)

A statutory scheme which authorized closing for one year any establishment adjudged to be a nuisance unless the operator posted a penal bond against future violations of nuisance laws would be patently unconstitutional insofar as it was construed to allow the state to close, for one year, an establishment that had exhibited obscene films or sold obscene printed matter. U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. arts. 4664, 4666.

8. Constitutional Law ⇐90(1)

A prior restraint of expression comes before the court with a heavy presumption against its constitutional validity. U.S.C.A.Const. Amend. 1.

9. Constitutional Law ⇐90.1(1)

The line between obscenity and protected speech is thin and uncertain. U.S. C.A.Const. Amend. 1.

10. Constitutional Law ⇐90.1(6)

It would constitute an impermissible prior restraint for the State of Texas to utilize its nuisance statutes to close for one year any theater that had exhibited obscene films. U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. arts. 4664, 4666.

11. Constitutional Law ⇐46(1)

Federal courts should refrain from passing on a constitutional question if there is an alternative ground such as statutory construction upon which the case may be decided.

12. Nuisance ⇐60

The Texas statute which provides for suits to enjoin a nuisance and which states that if an establishment is found to be a nuisance, judgment shall be rendered abating the nuisance and ordering that the nuisance be closed for one year from the date of the judgment, unless the defendants post a penal bond, was inapplicable to obscenity. Vernon's Ann. Tex.Civ.St. art. 4666; U.S.C.A.Const. Amend. 1.

13. Intoxicating Liquors ⇐259
Nuisance ⇐60

The one-year abatement procedure available under Texas nuisance statute may be constitutionally applied in cases of gambling, prostitution and liquor law violations; however, the one year abatement procedure cannot be constitutionally applied in cases of obscenity, bull fighting and live sex shows, which are covered only by any independent provision which defines certain activities as public nuisances. Vernon's Ann.Tex. Civ.St. arts. 4666, 4667; U.S.C.A.Const. Amend. 1.

14. Injunction ⇐204

Wholly apart from First Amendment considerations, an injunction prohibiting the future showing of various unnamed "obscene" films would be invalid under the Texas Rules of Civil Procedure, which require that an injunctive order be specific in terms and describe in reasonable detail the act or acts sought to be restrained. Vernon's Ann.Tex. Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1; Rules of Civil Procedure Tex. rule 683.

15. Injunction ⇐204

Under Texas law, an injunction decree must be as definite, clear and precise as possible and, when practicable, it should inform the defendant of the acts he is restrained from doing without calling on him to make inferences or conclusions about which persons might well differ. Rules of Civil Procedure Tex. rule 683.

16. Constitutional Law ⇐82(3)

Injunctions that abridge conduct protected by the First Amendment are constitutionally impermissible. U.S.C.A. Const. Amend. 1.

17. Constitutional Law ⇐90.1(1)

Obscenity is not protected speech. U.S.C.A.Const. Amend. 1.

18. Constitutional Law ⇐90.1(6)
Nuisance ⇐60

The Texas statute which defines the use of any premises for the commercial manufacturing, distribution or exhibition of obscene material as a public nuisance subject to injunction at the suit of either the state or any citizen was unconstitutional insofar as it authorized injunctions against the future exhibition of unnamed films; such a broad injunction would amount to a prior restraint on materials not yet declared obscene. Vernon's Ann.Tex.Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1.

19. Constitutional Law ⇐90.1(1)
Nuisance ⇐60

The Texas statute which defines the use of any premises for the commercial manufacturing, distribution or exhibition of obscene material as a public nuisance subject to injunction at the suit of either the state or any citizen was constitutionally infirm by reason of its failure to provide mandated procedural safeguards including a provision for a prompt and final judicial determination on the merits. Vernon's Ann.Tex.Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1.

20. Statutes ⇐48(3)

Federal court can construe two state statutes as exclusive of one another in order to avoid a constitutional difficulty.

21. Constitutional Law ⇐70.1(2)

Federal court cannot judicially rewrite Texas statutes and rules in order to incorporate mandatory constitutional safeguards against First Amendment violations. U.S.C.A.Const. Amend. 1.

22. Civil Rights ⇐13.17

Attorney fees are permissible in a civil rights suit alleging violations of First Amendment rights. U.S.C.A.Const. Amend. 1; 42 U.S.C.A. §§ 1981–1986, 1988.

23. Federal Civil Procedure ⇐2743

Court of Appeals has discretion to award costs and fees arising out of an appeal.

24. Civil Rights ⇐13.17

Although Court of Appeals had discretion to award costs and fees arising out of an appeal, it was appropriate for district court to determine total award to be made to prevailing party in suit under the Civil Rights Act where the district court had reached its decision on the merits prior to the effective date of the 1976 amendment providing for such

an award. 42 U.S.C.A. §§ 1981–1986, 1988; U.S.C.A.Const. Amend. 1.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.*

THORNBERRY, Circuit Judge:

This Texas obscenity case has had a long and somewhat unusual history. Originally filed on November 12, 1973, in the Northern District of Texas under the caption *King Arts Theatre, Inc. v. McCrea*, it was subsequently consolidated by the Chief Judge of this Court with other obscenity cases pending before a three-judge court sitting in the Southern District of Texas. That court had initially been constituted to hear a single case, *Universal Amusement Co. v. Vance*, the caption of which graces this opinion.

The consolidated cases eventually mushroomed to twenty, and the three-judge court selected for trial three representative cases: *King Arts Theatre, Inc. v. McCrea*, *Dexter v. Butler*, and *Ellwest Stereo Theatre, Inc. v. Byrd*. The district court's opinion is reported under the caption *Universal Amusement Co. v. Vance*, 404 F.Supp. 33 (S.D.Tex.1975). A panel of this Court affirmed the district court's decision in *Dexter* but reversed its ruling in *King Arts Universal Amusement Co. v. Vance*, 559 F.2d 1286 (5 Cir. 1977). The *Ellwest Stereo* case was not appealed.

This court ordered the two cases reheard *en banc* and subsequently severed and renumbered them, although both will continue to carry the *Universal Amusement* caption. This opinion thus treats only the appeal in *King Arts*, No. 75–4312,[1] and for the reasons stated below, we reverse the panel and affirm the judgment of the district court.

The facts can be briefly summarized. In 1973, King Arts Theatre, Inc. was operating an indoor, adults-only motion picture theatre in San Angelo, Texas, that showed sexually explicit films. On October 30 of that year, the landlord from whom the theater building was rented gave notice to King Arts that its lease was to be terminated as of November 15. According to the notice, County Attorney George E. McCrea had informed the landlord that he intended to obtain an injunction to abate the theater as a public nuisance in order to prohibit the future showing of allegedly obscene motion pictures.

King Arts filed suit on November 12 in the Northern District of Texas seeking injunctive and declaratory relief from any action by the county attorney under the Texas nuisance statutes.[2] The case was then transferred to the three-judge court, and the parties agreed to maintain the status quo until the case could be decided. The district court found that the landlord was terminating King Arts' lease "at the suggestion" of the county attorney, and that he intended to seek an injunction based on the nuisance statutes and to pursue cancellation of the lease.[3]

The district court concluded that *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), did not preclude granting the requested relief since no prosecution—either civil or criminal—was pending. It also found that a proceeding under the nuisance statutes would not cause irreparable injury and, accordingly, declined to grant injunctive relief. Reaching the merits of King Arts' claims, the court held that Texas courts would construe the phrase "obscene material" in the applicable Texas nuisance statute as the phrase was defined in the state's penal code and upheld that definition against a claim of unconstitutional vagueness. However, the court held that the Texas nuisance statutes, construed together, constituted an unconstitutional prior restraint on the distribution of materials not yet judicially determined to be obscene. In addition, the court expressed serious doubts about the validity of the Texas injunction procedures as applied in the obscenity context.

[1] The state of Texas[4] appealed from the district court's judgment that the nuisance statutes were unconstitutional. King Arts did not appeal from the court's denial of injunctive relief or its upholding of the state's obscenity definition. Because this is an appeal from the grant of declaratory relief alone, the Supreme Court is without jurisdiction to hear a direct appeal under 28 U.S.C. § 1253, and the appeal is properly before this Court. *Gerstein v. Coe*, 417 U.S. 279, 94 S.Ct. 2246, 41 L.Ed.2d 68 (1974); *Beal v. Doe*, 432 U.S. 438, 443, 97 S.Ct. 2366, 53 L.Ed.2d 464 n.5 (1977).[5]

I.

[2–6] The only issue on appeal[6] is the constitutionality of the Texas nuisance statutes as applied to obscenity, although this question requires three separate but related inquiries. At the outset, we stress that while obscenity is not within

* Judge Morgan was a member of the en banc court under 28 U.S.C.A. § 46(c) and participated in the oral argument of the case en banc. Subsequently, the Omnibus Judgeship Bill, Public Law 95–486 (95th Congress), 92 Stat. 1629 was approved October 20, 1978. In view of this, Judge Morgan does not participate in this decision.

1. The *Dexter* case was renumbered as 75–4313, and the decision of the *en banc* Court is reported at —— F.2d —— (5 Cir. 1978).

2. Jurisdiction was based on 28 U.S.C. § 1343, the jurisdictional counterpart to 42 U.S.C. § 1983, as well as on 28 U.S.C. § 2201 (declaratory judgments).

3. As the panel opinion pointed out, nothing in the landlord's notice letter to King Arts indicates that the lease termination was at the suggestion of McCrea; rather, the letter stated that the termination was to avoid the embarrassment and inconvenience of joinder as a defendant in a suit to enjoin the showing of pornographic films. 559 F.2d at 1289 n.2. However, the district court's opinion states that the facts recited therein were "agreed to by the parties," 404 F.Supp. at 38, and neither party challenges the district court's factual findings on appeal.

4. In addition to County Attorney McCrea, the suit named as defendants Texas Governor Dolph Briscoe and Attorney General John Hill.

5. Under § 1253, any party may directly appeal to the Supreme Court from an order granting or denying an injunction in any civil action required to be heard by a three-judge court. Former § 2281, now repealed, provided that any injunction restraining the enforcement of a state statute or restraining a state official from enforcing such statute "shall not be granted . . . upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges." Because this action had been commenced before the effective date of the repealing legislation, § 2281 applied to this suit. Pub.L. 94–381, § 7; 94th Cong., 2d Sess. (1976) U.S.Code Cong. & Admin.News 1976, p. 1988.

6. Appellant did not raise the question of *Younger* abstention, and that issue, being non-jurisdictional, is thus not before this court. We note that in the instant case, there were no state proceedings pending when the suit was brought. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d. 648 (1975).

the purview of the first amendment, *Roth v. United States*, 354 U.S. 476, 485, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), state regulation must not be permitted to impinge upon "speech that matters." Justice Brennan eloquently expressed this important concept in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963):

> [T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools."

Id. at 66, 83 S.Ct. at 637 [citations and internal quotations omitted].[7]

[7] Our initial concern is whether the Texas statutory scheme operates as an unconstitutional prior restraint by allowing the state to close, for one year, an establishment that has exhibited obscene films or sold obscene printed matter. Although the instant case involves motion pictures, our analysis is equally applicable to printed material.

Article 4666 of the Texas Revised Civil Statutes[8] provides for suits in the name of the state to enjoin a nuisance. If an

7. We also note other principles common to our three inquiries in this case. Corporate activities can clearly come within the first amendment, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), and entertainment, as well as news, enjoys first amendment protection. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). Motion pictures are covered by the first amendment, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), and precision of regulation must be the touchstone. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 682, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968). A film carries with it a presumption of first amendment protection, *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), and the courts "must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973).

8. Tex.Rev.Civ.Stat.Ann. art. 4666 provides:

> Whenever the Attorney General, or the district or county attorney has reliable information that such a nuisance exists, either of them shall file suit in the name of this State in the county where the nuisance is alleged to exist against whoever maintains such nuisance to abate and enjoin the same. If judgment be in favor of the State, then judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year from the date of said judgment, unless the defendants in said suit, or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is alleged to exist, in the penal sum of not less than one thousand nor more than five thousand dollars, with sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this law shall not be done or permitted to be done in said house. On violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and for the State in the county where such conditions are violated, all such suits to be brought by the district or county attorney of such county.

establishment is deemed a nuisance, there exists the rather Draconian remedy of closing the establishment "for one year from the date of said judgment," unless the operator posts a penal bond ranging from $1,000 to $5,000 against future violations of the nuisance laws. Article 4664[9] defines three types of establishments as "common nuisances," and the proprietor of such an establishment is guilty of "maintaining a nuisance": gambling houses, houses of prostitution, and places where intoxicating liquors are illegally kept, manufactured, sold, or given away.[10]

Article 4667[11] defines the commercial manufacture, distribution, or exhibition of obscene material as a "public nuisance" and also sets forth a list of other nuisances, including gambling, prostitution, and bull fighting. The statute further provides that such activities "shall be enjoined at the suit of either the State or any citizen thereof."

The Texas courts have not examined the relationship between Articles 4666 and 4667. *Compare State ex rel. Ewing v. "Without a Stitch,"* 37 Ohio St.2d 95, 307 N.E.2d 911, 917–18 (1974), *app. dism'd*, 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2d 82 (1975) (interpreting one-year closing provision of state nuisance statute). The plain language of the statutes

9. Tex.Rev.Civ.Stat.Ann. art. 4664 provides:

> Any hotel, rooming house or boarding house, country club, garage, rent car stand or other place to which the public commonly resort for board or lodging or commonly congregate for business or pleasure, where intoxicating liquors are kept, possessed, sold, manufactured, bartered or given away, or where intoxicating liquors are furnished to minors or to students of any educational institution, or where persons habitually resort for the purpose of prostitution or to gamble as prohibited by the Penal Code, is hereby declared to be a common nuisance. Any person who knowingly maintains such a place is guilty of maintaining a nuisance.

10. The liquor provision has been construed as referring to places where liquor law violations occur. *See State v. Parker*, 147 Tex. 57, 212 S.W.2d 132 (1948).

11. Tex.Rev.Stat.Ann. art. 4667 provides:

> (a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:
>
> (1) For gambling, gambling promotion, or communicating gambling information prohibited by law;
>
> (2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;
>
> (3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;
>
> (4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;
>
> (5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law.
>
> (b) Any person who may use or be about to use, or who may be a party to the use of any such premises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney or City Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of.

Prior to its amendment in 1973, Article 4667 did not denominate its various injunction-worthy activities as nuisances. The 1973 amendment, which brought commercial obscenity within the statute, also added the term "nuisance."

suggests that obscenity, which is defined as a nuisance under Art. 4667, is thus subject to the one-year closing provisions of Art. 4666. So read, the statutes would be patently unconstitutional insofar as they pertain to obscenity.

[8, 9] A prior restraint of expression comes before this court with "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan, supra* 372 U.S. at 70, 83 S.Ct. at p. 639; *New York Times Co. v. United States,* 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). Read together, Articles 4666 and 4667 clearly create a prior restraint. The statutes allow the state to close, for one year, a theatre that has exhibited obscene films. Unless a bond from $1,000 to $5,000 is posted, the showing of *any* motion picture is punishable by contempt of court. Thus, future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Moreover, although a theater operator may post the bond and show films, he forfeits that bond if one of the films he has selected is deemed obscene. This statutory scheme obviously encourages a theater operator to steer wide of the danger zone by avoiding borderline films that are nonetheless protected under the first amendment. The line between obscenity and protected speech is "dim and uncertain," *Bantam Books, Inc. v. Sullivan, supra* 372 U.S. at 66,[12] 83 S.Ct. 631, and difficulty in locating that line leads to self-censorship, a particularly subtle and most insidious form of the malady. *Cf. New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (defamation).

[10] Application of the one-year closing provisions in obscenity cases under the Texas nuisance statutes would constitute an impermissible prior restraint, since the state would be "enjoin[ing] the future operation of a [business] which disseminates presumptively First Amendment protected materials solely on the basis of the nature of the materials which were sold . . . in the past." *Speight v. Slaton,* 356 F.Supp. 1101, 1107 (N.D.Ga.1973) (Morgan, J., dissenting), *vacated and remanded,* 415 U.S. 333, 94 S.Ct. 1098, 39 L.Ed.2d 367 (1974). Many courts have so held.[13]

12. As Justice Brennan has observed:

> The essence of our problem in the obscenity area is that we have been unable to provide "sensitive tools" to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into suppression of the latter.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 79–80, 93 S.Ct. 2628, 2645, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting). *See also Ginzburg v. United States,* 383 U.S. 463, 480–81, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966) (Black, J., dissenting).

13. *E. g., Sanders v. State,* 231 Ga. 608, 203 S.E.2d 153 (1974); *Gulf States Theatres of Louisiana, Inc. v. Richardson,* 287 So.2d 480 (La.1974); *General Corp. v. State ex rel. Sweeton,* 294 Ala. 657, 320 So.2d 668 (1975), *cert. denied,* 425 U.S. 904, 96 S.Ct. 1494, 47 L.Ed.2d 753 (1976); *Mitchem v. State ex rel. Schaub,* 250 So.2d 883 (Fla.1971); *People ex rel. Busch v. Projection Room Theatre,* 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600, *cert. denied,* 429 U.S. 922, 97 S.Ct. 320, 50 L.Ed.2d 289 (1976); *New Riviera Arts Theatre v. State ex rel. Davis,* 219 Tenn. 652, 412 S.W.2d 890 (1967); *State ex rel. Blee v. Mohney Enterprises,* 154 Ind.App. 244, 289 N.E.2d 519 (1973); *State ex rel. Field v. Hess,* 540 P.2d 1165 (Okl.1975); *State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976); *State ex rel. Ewing v. "Without a Stitch," supra; Spokane Arcades v. Ray,* 449 F.Supp. 1145 (E.D.Wash. 1978). *See generally* Edelstein & Mott, *Collateral Problems in Obscenity Regulation: A Uniform Approach to Prior Restraints, Community Standards, and Judgment Preclusion,* 7 Seton Hall L.Rev. 543 (1976); Hogue, *Regulating Obscenity Through the Power to Define and Abate Nuisances,* 14 Wake Forest L.Rev. 1 (1978); Rendleman, *Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute,* 44 U.Chi.L.Rev. 509 (1977).

[11–13] However, the federal courts should refrain from passing upon a constitutional question if there is an alternative ground such as statutory construction upon which the case may be decided. *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *Pugh v. Rainwater,* 572 F.2d 1053, 1058 (5 Cir. 1978) (en banc). Accordingly, we hold that the one-year closing remedy provided in Article 4666 is inapplicable to obscenity and that the injunctive remedy provided in Article 4667 is the exclusive procedure for abating obscene exhibitions as nuisances. Thus, the one-year abatement procedure can be applied in cases of gambling, prostitution, and liquor law violations, all of which are defined as nuisances in Article 4664, but not in cases of obscenity, bull fighting, and live sex shows, which are covered only by Article 4667. This reading of the statutes, while somewhat strained,[14] is not implausible, given the fact that Articles 4664–66 were enacted in one bill, prior to enactment of Article 4667, and that Article 4667 did not contain the term "nuisance" until its amendment in 1973. *See* 559 F.2d at 1291 (panel opinion).

14. We could, for example, speculate that the legislature treated obscenity only in Article 4667 because it recognized the first amendment implications of a one-year closing under Article 4666. However, if that is so, it is rather odd that the legislature chose to include live sex shows and bull fighting in the same statute as obscenity, since those two activities implicate the first amendment only in the barest fashion. *Cf. California v. LaRue,* 409 U.S. 109, 118, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972). We note that our efforts at statutory interpretation are handicapped by the lack of a legislative history of the nuisance statutes.

II.

King Arts also urges that the injunction permitted by Article 4667(a)(3) is constitutionally deficient because the state can obtain an injunction that prohibits the future showing of various unnamed "obscene" films. The district court hinted its agreement but did not discuss the matter at length in view of its disposition of the case. The panel, however, determined that the injunctive procedure was "basically sound." 559 F.2d at 1292.[15]

[14, 15] Wholly apart from first amendment considerations, such a broadly drawn injunction would be invalid under the Texas Rules of Civil Procedure, which require that the injunctive order "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained . . . ." Rule 683, Tex.R.Civ.P. As the Texas Supreme Court explained in *Villalabos v. Holquin,* 146 Tex. 474, 208 S.W.2d 871, 875 (1948):

> [A]n injunction decree must be as definite, clear and precise as possible, and when practicable it should inform the defendant of the acts he is restrained from doing, without calling on him for inferences or conclusions about which

15. King Arts did not cross-appeal in this case, but it need not have done so in order to urge alternative theories in support of the district court's judgment that Article 4667(a)(3) is unconstitutional. *United States v. American Ry. Express Co.,* 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924); *Lowe v. Pate Stevedoring Co.,* 558 F.2d 769, 770–71 n.2 (5 Cir. 1977).

persons might well differ and without leaving anything for further hearing. *See also Ex parte Slavin*, 412 S.W.2d 43 (Tex.1967).

For example, in *Moore v. State*, 470 S.W.2d 391 (Tex.Civ.App.—San Antonio 1971, writ ref. n. r. e.), the trial court had granted a temporary injunction prohibiting the sale of certain specific magazines and books, as well as the sale of "similar" material. In holding the "similar material" portion of the injunction invalid under Rule 683, the court said:

> [The order] does not sufficiently appraise [sic] appellants of the acts they are restrained from doing. In effect, the court is passing upon the obscenity of books, magazines, newspapers and films not before it, and perhaps not now in existence; and it prohibits generally the defendants from violating a penal statute without clear, precise or definite guidelines.

470 S.W.2d at 396. Moreover, in *Richards v. State*, 497 S.W.2d 770 (Tex.Civ. App.—Beaumont 1973, no writ), the court was faced with an injunction prohibiting, *inter alia*, the exhibition and distribution of obscene material in violation of the Texas Penal Code. Relying on *Moore*, the court held this portion of the injunction invalid under Rule 683: "This facet of the decree does not even comport with our basic rules of civil procedure, much less the almost insurmountable obstacle of the First Amendment." 497 S.W.2d at 778.

However, the *Richards* decision indicates that the Texas courts are willing to uphold more specifically framed injunctions against unnamed future films or publications. Another portion of the injunction in *Richards* prohibited the defendants from "exhibiting or selling any other films which show actual acts of fellatio . . ., cunnilingus . . ., actual oral genital contact between two or more males or females, any sexual intercourse between any human and any animal or any scenes depicting actual sexual intercourse between human males and females." The court, while recognizing the first amendment problems, upheld this part of the injunction as being "specific, definite, and clear." 497 S.W.2d at 780.[16]

Similarly, in *Locke v. State*, 516 S.W.2d 949 (Tex.Civ.App.—Texarkana 1974, no writ), the trial court had issued a temporary injunction enjoining appellant from commercially exhibiting films portraying acts of sexual intercourse, deviate sexual intercourse, and bestiality as defined by Texas Penal Code §§ 21.01, 21.07. The court upheld the injunction, concluding that it was not impermissibly vague and was not a prior restraint. The court said:

> The order in question here restrains only the exhibition of films depicting specific activities conducted in a certain manner. All these activities are expressly defined by statute and have been authoritatively construed to constitute obscenity not entitled to constitutional protection. The order does not contain a blanket suppression of films vaguely labeled "obscene," and there is no suppression of films by name or any other designation except by reference to the specific conduct depicted therein.

16. The court modified the decree to incorporate the holding of *Miller v. California*, *supra*:

> The injunction granted by this paragraph of the order is limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value."

497 S.W.2d at 782.

516 S.W.2d at 954–55 [citations omitted].[17]

It thus appears that Rule 683, as interpreted by the Texas courts, would allow the issuance of an injunction against the future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute.[18] That is, while an injunction cannot simply forbid the showing of "obscene films," it can prohibit the showing of films that fall within the statutory definition of obscenity, so long as the prohibited acts are spelled out in the injunction. If this is the case—and the *Richards* and *Locke* decisions apparently represent the current state of the law—then we must examine such an injunction in light of the first amendment.

[16, 17] Injunctions that abridge conduct protected by the first amendment are constitutionally impermissible. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); *United Transp. Union v. State Bar*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971). Although obscenity is not protected speech, "[t]he line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448 (1975). Accordingly, the Supreme Court has recognized the validity of injunctions against obscenity only when various safeguards are employed. For example, in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445, 77 S.Ct. 1325, 1330, 1 L.Ed.2d 1469 (1957), the Court upheld a New York statute, which, as authoritatively construed, "studiously withholds restraint upon matters not already published and not yet found to be offensive." Similarly, in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55, 93 S.Ct. 2628, 2634, 37 L.Ed.2d 446 (1973), the Court emphasized that a Georgia statute imposed no restraint on the exhibition of films "until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected." No such safe-

17. The court also stressed the existence in the order of an agreed procedure by which appellant could secure a judicial determination of a film's status prior to its exhibition. This procedure, the court said, "is designed to prevent constitutionally protected material from being suppressed." 516 S.W.2d at 955.

18. Tex. Penal Code § 43.21 (Supp.1978) provides, in pertinent part:

> (1) "Obscene" means having as a whole a dominant theme that:
> (A) appeals to the prurient interest of the average person applying contemporary community standards;
> (B) depicts or describes sexual conduct in a patently offensive way; and
> (C) lacks serious literary, artistic, political, or scientific value.
> * * * * * *
> (3) "Prurient interest" means an interest in sexual conduct that goes substantially beyond customary limits of candor in description or representation of such conduct. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.
> * * * * * *
> (6) "Sexual conduct" means:
> (A) any contact between any part of the genitals of one person and the mouth or anus of another person;
> (B) any contact between the female sex organ and the male sex organ;
> (C) any contact between a person's mouth or genitals and the anus or genitals of an animal or fowl; or
> (D) patently offensive representations of masturbation or excretory functions.

guards exist under Texas law. *See, e. g., Richards v. State, supra.*[19]

An order banning the exhibition of unnamed "obscene" films would prohibit the showing of films that have not been judicially declared obscene, as well as films that may not have even been produced. Such a blanket ban is not rendered unobjectionable by the interweaving of threats of language from obscenity statutes, for the end result is a sweeping prohibition against the screening of obscene films in general. Incorporation of the statutory definition of obscenity—usually a listing of forbidden sexual acts or acrobatics—merely begs the question, for few of us have the omniscience to determine, in advance of a final judicial ruling, whether a film is legally obscene. Moreover, it is possible that a film containing many of the acts listed in the statute may eventually be held *not* to be obscene, since the work must be taken as a whole, *Miller v. California, supra,* and since state law cannot define the "contemporary community standards" that must be applied by the fact finder. *Smith v. United States,* 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977). An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive. As Chief Justice Hughes wrote in *Near v. Minnesota, supra* 283 U.S. at 713, 51 S.Ct. at 630, "[t]his is of the essence of censorship."

[18] We therefore hold that Article 4667(a)(3) is unconstitutional insofar as it authorizes injunctions against the future exhibition of unnamed films. Such a broad injunction simply cannot stand, for it amounts to a prior restraint on materials not yet declared obscene. *Parish of Jefferson v. Bayou Landing, Ltd.,* 350 So.2d 158 (La.1977); *News Mart, Inc. v. State ex rel. Webster,* 561 S.W.2d 752 (Tenn.1978); *Ranck v. Bonal Enterprises, Inc.,* 467 Pa. 569, 359 A.2d 748 (Pa.1976); *Fehlhaber v. North Carolina,* 445 F.Supp. 130 (E.D.N.C.1978); *Mitchem v. State ex rel. Schaub, supra; State ex rel. Field v. Hess, supra; New Riviera Arts Theatre v. State ex rel. Davis, supra; Busch v. Projection Room Theatre, supra.*

III.

[19] King Arts also contends that Article 4667(a)(3) lacks the procedural safeguards required under *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).[20] Those safeguards were recently affirmed in *Southeastern Promotions, Ltd. v. Conrad, supra,* in which the Court summarized them as follows:

> *First,* the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second,* any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third,* a prompt final judicial determination must be assured.

19. Although some safeguards may apparently be written into an injunction, *see Locke v. State, supra* at 955 (discussed at footnote 17, *supra*), there is no *requirement* that they be included.

20. The district court expressed serious doubts about the validity of the Texas injunction procedure in the obscenity context but did not make a specific ruling in light of its disposition of the case. 404 F.Supp. at 45–46. The panel, however, upheld the procedures as constitutional. 559 F.2d at 1292–93.

420 U.S. at 560, 95 S.Ct. at 1247 [italics in original]. *See also United States v. Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 44 (1971); *Blount v. Rizzi,* 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); *Teitel Film Corp. v. Cusack,* 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966 (1971).

Although *Freedman* arose in the context of obscenity determinations made by administrative bodies such as licensing boards or film commissions, its principles clearly extend to state statutes and rules governing injunctions against obscenity. *McKinney v. Alabama,* 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976); *Paris Adult Theatre I v. Slaton, supra; Grove Press, Inc. v. Philadelphia,* 418 F.2d 82 (3 Cir. 1969); *United Artists Corp. v. Wright,* 368 F.Supp. 1034 (M.D. Ala.1974) (Three-judge court); *Gundlach v. Rauhauser,* 304 F.Supp. 962 (M.D.Pa. 1969) (three-judge court).

Under the Texas injunction procedure, the trial court has broad discretion to grant or deny a temporary injunction, the purpose of which is to preserve the status quo of the suit's subject matter pending a final trial of the case on its merits. Accordingly, the trial court's decision is not a ruling on the merits of the case, but rather a determination of whether the applicant has shown a "probable right" and a "probable injury." In carrying this burden, the applicant is not required to establish that he will finally prevail in the litigation. The judgment of the trial court will be upheld unless the appellate court is convinced there was a clear abuse of discretion, and there is no such abuse if the evidence "tends" to sustain the cause of action as alleged. *State v. Southwestern Bell Tel. Co.,* 526 S.W.2d 526 (Tex.1975); *Oil Field Haulers Ass'n v. Railroad Comm'n,* 381 S.W.2d 183 (Tex.1964); *Janus Films, Inc. v. City of Fort Worth,* 163 Tex. 616, 358 S.W.2d 589 (1962); *Transport Co. of Texas v. Robertson Transports, Inc.,* 152 Tex. 551, 261 S.W.2d 549 (1953); *Texas Foundries, Inc. v. Foundry Workers,* 151 Tex. 239, 248 S.W.2d 460 (1952); *Southwestern Greyhound Lines v. Railroad Comm'n,* 128 Tex. 560, 99 S.W.2d 263 (Tex.1936); *Hickman v. Board of Regents,* 552 S.W.2d 616 (Tex.Civ.App.—Austin 1977, writ ref'd).[21]

It is also clear that a party is not to receive full relief at a hearing for a temporary injunction, since the burden at that stage—"probable right" and "probable injury"—is substantially different from that at a final hearing on the merits. *Houston Belt & Terminal Ry. Co. v. Texas & N.O.R.R. Co.,* 155 Tex. 407, 289 S.W.2d 217 (1956); *North East I.S.D. v. North East Federation of Teachers,* 541 S.W.2d 191 (Tex.Civ.App.—El Paso 1976, no writ).

Pursuant to Rules 680–693a of the Texas Rules of Civil Procedure, the state can obtain, ex parte, a 10-day temporary restraining order against the showing of

21. By way of comparison, this court has held that a federal district court, in order to grant a preliminary injunction, must find that the moving party has satisfied four prerequisites: (1) substantial likelihood of success on the merits; (2) a showing of irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. The movant has the heavy burden of persuading the district court that all four elements are satisfied, and this court will overturn the district court's decision only for abuse of discretion. *E. g., Hardin v. Houston Chronicle Pub. Co.,* 572 F.2d 1106 (5 Cir. 1978); *Canal Authority v. Callaway,* 489 F.2d 567 (5 Cir. 1974).

an allegedly obscene film. As soon as possible within the 10-day period, a hearing on a temporary injunction is obtainable. As the cases cited above make clear, this hearing is not a final adjudication on the merits, and, accordingly, the issuance of a temporary injunction is not a final judicial determination of obscenity. Rather, the granting of such an injunction represents the trial court's determination that the applicant has shown a "probable right" and a "probable injury" and has presented evidence that "tends" to sustain his cause of action. On appeal from the temporary injunction, the theater operator who has been enjoined cannot argue that the suppressed film is not obscene. Rather, "[t]he action under appellate review . . . is the exercise by the trial court of the discretionary power [to issue the injunction] pending trial, thereby maintaining the status quo." *State v. Southwestern Bell Tel. Co., supra* at 528.[22]

Under the Texas procedure, the obscenity case is treated no differently than any other civil case. Thus, if the theater operator is unable to convince an appellate court that the trial court abused its discretion in granting the temporary injunction, the order remains in effect and the film—which is presumably protected under the first amendment—remains suppressed pending a full-blown trial on the merits.[23] At such a trial, it is quite possible for the court to hold that the film is not obscene, *cf. Texas Foundries, Inc. v. Foundry Workers, supra* 261 S.W.2d at 464; *Lloyd A. Fry Roofing Co. v. State*, 541 S.W.2d 639, 648 (Tex.Civ.App.—Dallas 1976, writ ref. n. r. e.), with the end result being that a film protected by the first amendment has been indefinitely suppressed before an on-the-merits judicial determination of obscenity. The Court recognized such a danger in *Freedman*: "the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous" preliminary restraint. 380 U.S. at 59, 85 S.Ct. at 739. Moreover, in *Southeastern Promotions* the Court, as in *Freedman* analyzing an administrative system, stressed that a final on-the-merits judicial determination was not immediately available. Justice Blackmun wrote:

> The board's system did not provide a procedure for prompt judicial review. Although the District Court commendably held a hearing on petitioner's motion for a preliminary injunction within a few days of the board's decision, it did not review the merits of the decision at that time. The question at the hearing was whether petitioner should receive *preliminary* relief, i. e., whether there was a likelihood of success on the merits and whether petitioner would suffer irreparable injury pending full review. Effective review on the merits was not obtained until more than five months later. * * * During the time prior to judicial determination, the restraint altered the status quo.

420 U.S. at 561–62, 95 S.Ct. at 1248 [emphasis in original].

The identical situation is present under the Texas injunction procedure; the hearing on the temporary injunction does not constitute an on-the-merits determination of obscenity, and there is no provision for a prompt review on the merits. And, while such a temporary injunction is in effect, the status quo is obviously altered—rather than maintained—and presumably protected speech is indefinitely suppressed. It is difficult to improve upon the words of Judge Aldisert in *Grove Press, Inc. v. Philadelphia, supra*:

> The mischief we perceive . . . is that there is no guarantee a final hearing will be seasonably scheduled after the issuance of a preliminary injunction and that a prompt decision will be forthcoming thereafter. The preliminary restraint could exist days, and even months, before the judicial decision on the merits; where this possibility exists, an unacceptable threat to the freedom of expression without due process of law results.
>
> * * * * * *
>
> Where expression is inhibited as a result of prompt judicial decision reached after an adversary proceeding, there can be no procedural due process complaint. But where the inhibition occurs in a preliminary proceeding, with no guarantee of a prompt judicial decision on the merits, the procedure is constitutionally defective because a restraint of presumably protected expression not only occurs but is capable of persisting for an unlimited time prior to the required judicial determination.

418 F.2d at 90.

Accordingly, we hold that Article 4667(a)(3), which authorizes injunctions in the obscenity context, is constitutionally infirm for its failure to provide the safeguards mandated by *Freedman*. In short, the Texas procedure does not treat obscenity with the kid gloves that the first amendment requires, for the state's process for ascertaining whether certain materials are obscene must ensure "the necessary sensitivity to freedom of expression." *Freedman v. Maryland, supra* 380 U.S. at 58, 85 S.Ct. at 739. *Compare* the New York procedure outlined in *Kingsley Books, Inc. v. Brown, supra*, which the *Freedman* Court described as a "model."[24]

22. We note that the Texas procedure does not provide a mechanism for the issuance of a "preservation order" enjoining a theater from disposing of the allegedly obscene film pending trial but not interfering with its continued exhibition. *Compare* N.C.Gen.Stat. § 14–190.-2(d)(3); Tenn.Code Ann. § 39–3019. *See Paris Adult Theatre I v. Slaton, supra; Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973).

23. It is no answer to maintain that the theater operator could obtain a prompt, final judicial determination of obscenity by violating the injunction and thus bringing about contempt proceedings. *See* Tex.Rev.Civ.Stat.Ann. art. 1911a; Rule 692, Tex.R.Civ.P. Such a violation would constitute constructive criminal contempt, *Ex parte Werblud*, 536 S.W.2d 542 (Tex.1976), and the state would have the burden of proof beyond a reasonable doubt. Surely one is not required to risk criminal sanction in order to obtain what *Freedman* requires the state to provide. Under the contempt procedure, the burden of obtaining a prompt, final judicial determination of obscenity is impermissibly placed on the theater operator. Moreover, although the state has the burden of proving beyond a reasonable doubt that the theater operator is guilty of contempt, it is not clear whether the state also has the burden of proving that the film is obscene, as *Freedman* requires. *Cf. Railroad Comm'n v. Sample*, 405 S.W.2d 338, 343 (Tex.1966).

24. Texas once had a procedure by which obscenity injunctions were treated in a special fashion. Texas Penal Code of 1925, art. 527, § 13, *repealed*, Acts of 1973, 63d Legislature, ch. 399, § 3. This same legislation amended present Art. 4667 to include obscenity. Ch. 399, § 2(J). For judicial consideration of the former procedure, see *State v. Scott*, 460 S.W.2d 103 (Tex.1970), *cert. denied*, 402 U.S. 1012, 91 S.Ct. 2188, 29 L.Ed.2d 435 (1971); *Newman v. Conover*, 313 F.Supp. 623 (N.D. Tex.1970) (three-judge court); *Fontaine v. Dial*, 303 F.Supp. 436 (W.D.Tex.1969) (three-judge court).

The Pennsylvania injunction rules include the following provision:

[20, 21] Although this court can construe two state statutes to be exclusive of one another in order to avoid a constitutional difficulty, as we have done in Part I of this opinion, we cannot judicially rewrite the Texas statutes and rules to incorporate the *Freedman* safeguards. As the Supreme Court said in *Freedman* "[h]ow or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is for the state to decide." 380 U.S. at 60, 85 S.Ct. at 740. *Compare United States v. Thirty-Seven Photographs, supra* (federal statute). The task of complying with *Freedman* must therefore be left to the State of Texas.

IV.

[22] King Arts seeks a remand to the district court for a determination and award of costs and attorneys' fees. Under 42 U.S.C. § 1988, as amended in 1976, a "prevailing party" in an action brought under the Civil Rights Acts, 42 U.S.C. §§ 1981–86, may be awarded "a reasonable attorney's fee as part of the costs." The statute's constitutionality has been upheld. *Hutto v. Finney*, —— U.S. ——, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Rainey v. Jackson State College*, 551 F.2d 672 (5 Cir. 1977). These decisions also make clear that § 1988 permits attorneys' fees in cases that were pending at the time of its enactment. The instant case falls into that category.[25]

[23, 24] Although this court has discretion to award costs and fees arising out of an appeal to this court, *Globe Life & Accident Ins. Co. v. Still*, 402 F.2d 295 (5 Cir. 1968), we think that the district court should determine the total award here, *see Panior v. Iberville Parish School Board*, 543 F.2d 1117, 1120 (5 Cir. 1976), especially since the district court reached its decision on the merits prior to the effective date of the 1976 amendment to § 1988. Accordingly, we remand the case to the managing judge of the district court with directions to set reasonable attorneys' fees in accordance with the standards established in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5 Cir. 1974). The district court shall determine the necessity of holding an evidentiary hearing.

V.

The judgment of the district court holding unconstitutional Tex.Rev.Civ. Stat.Ann. art. 4667(a)(3) is AFFIRMED, and the case is REMANDED to the district court for the awarding of reasonable attorneys' fees to King Arts, the prevailing party.

SO ORDERED.

> When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant. A final decree shall be filed . . within twenty-four (24) hours after the close of the hearing. If the final hearing is not held within the three (3) day period, or if the final decree is not filed within twenty-four (24) hours after the close of the hearing, the injunction shall be deemed dissolved.
>
> Rule 1531(f)(1), Pa.R.Civ.P. An explanatory note states that the three-day period is a maximum and that "in particular cases, a shorter period may be required." For relevant judicial background, see *Grove Press, Inc. v. Philadelphia, supra; Duggan v. 807 Liberty Ave., Inc.*, 447 Pa. 281, 288 A.2d 750 (Pa.1972); *Commonwealth v. Guild Theatre, Inc.*, 432 Pa. 378, 248 A.2d 45 (Pa.1968).

25. As the panel opinion makes clear, attorneys' fees are permissible in a civil rights suit alleging violations of first amendment rights. 559 F.2d at 1300–01. *See also Simpson v. Weeks*, 570 F.2d 240 (8 Cir. 1978); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114 (1 Cir. 1977).

GEE, Circuit Judge, with whom BROWN, Chief Judge, COLEMAN, AINSWORTH, TJOFLAT and VANCE, Circuit Judges, join, dissenting:

I.

Of Draconian Remedies and Strained Constructions to Avoid Them

Part I of the majority opinion reaches the same result on about the same reasoning as the panel opinion, *see* 559 F.2d at 1290–92. I concur in it.

II.

Of Injunctions, Statutes and Prior Restraints

Part II of the majority opinion declares Texas Article 4667(a)(3) unconstitutional as authorizing injunctions against the future exhibition of unnamed obscene films. The Texas statutes defining obscenity are couched in the language of the Supreme Court's decision in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and there is no contention that their standards or definitions are overbroad. Further, the Texas courts (as a matter of general procedural law) require in the obscenity context as elsewhere that injunctions be specific, clear and definite. In the example chosen by the majority, *Richards v. State*, 497 S.W.2d 770 (Tex. Civ.App.—Beaumont 1973, no writ hist.), the injunction prohibited "exhibiting or selling any other films which show actual acts of fellatio . . ., cunnilingus . . ., actual oral genital contact between two or more males or females, any sexual intercourse, between any human and any animal or any scenes depicting actual sexual intercourse, between human males and females." 497 S.W.2d at 772. Modifying the decree to incorporate the holding of *Miller v. California, supra*,[1] the Texas court upheld the injunction.

Thus the holding of the majority appears to be that any injunction, no matter how specific, that restrains the exhibition of films by definitions or categories rather than one-by-one and after the fact of a specific, prior adjudication of obscenity is invalid. To quote from the opinion (Maj. op. p. 1653):

> "An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive. As Chief Justice Hughes wrote in *Near v. Minnesota, supra*, 283 U.S. 697, at 713, 51 S.Ct. 625, '[t]his is of the essence of censorship.' "

I think that there are serious flaws in this reasoning.

In the first place, the majority's statement is simply incorrect: an injunction against exhibiting a film depicting enumerated acts from the obscenity statute suppresses that film not at all "because past films have been deemed offensive" but because the present film depicts the acts in a manner forbidden by the statute.

In the second, the quotation from *Near v. Minnesota* is a characterization of an entirely different sort of act—the suppression of publication of future issues of a newspaper because earlier issues were deemed scandalous. The analog of such an act in the present context

1. "The injunction granted by this paragraph of the order is limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value." 497 S.W.2d at 782.

would be the closing of King Art's Theatre to exhibition of *any* film because it had exhibited obscene ones in the past. This would indeed be "of the essence of censorship," but it is a far cry from an injunction forbidding in specific terms the exhibition of such films only as violate the statute.

Indeed, the majority's reasoning on this head comes to little more than announcing that injunctions are prior restraints and prior restraints are bad. The suggestion that an injunction merely against obscene matter—admittedly unprotected by the first amendment—might be valid is disposed of, as nearly as I can understand the opinion, by the observation that obscenity cannot be defined with sufficient precision to be the subject matter of a valid injunction. Unless this is what the sentence at Maj. op. p. 1653 commencing "Incorporation of the statutory definition of obscenity . . . merely begs the question" means, then I do not know what it means. But this argument proves too much, for if the definition is too vague for an injunction, surely it must also be too vague to satisfy due process as giving fair notice of conduct subject to criminal penalties?

More, the argument is overbroad in another respect. It implies that no injunction in a first amendment context is valid, though we know this is not so. Indeed, as a practical matter, I can see little if any difference between an injunction against exhibiting obscene films (constitutionally defined) and a statute against doing so, and what difference there is favors the injunction. As Mr. Justice Frankfurter wrote for the Court in *Kingsley Books v. Brown*, 354 U.S. 436, 441–2, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957):

"The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly noxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 539.

"Wherein does § 22-a differ in its effective operation from the type of statute upheld in Alberts? Section 311 of California's Penal Code provides that 'Every person who wilfully and lewdly . . . keeps for sale . . . any obscene . . . book . . . is guilty of a misdemeanor . . . .' Section 1141 of New York's Penal Law is similar. One would be bold to assert that the *in terrorem* effect of such statutes less restrains booksellers in the period before the law strikes than does § 22–a. Instead of requiring the bookseller to dread that the offer for sale of a book, may without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity. Until then, he may keep the book for sale and sell it on his own judgment rather than steer 'nervously among the treacherous shoals.' "

Thus if a statute forbidding publication of obscenity can be constitutionally valid, it is hard for me to see how an injunction doing the same thing is per se invalid. Yet as nearly as I can understand the majority opinion, this is what Part II of it says.

III.

Of Kid Gloves and Obscenity

Part III of the court's opinion purports to invalidate Texas Article 4667(a)(3) on the additional ground that it "lacks the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)" (Maj. op. p. 1653) and hence fails to "treat obscenity with the kid gloves that the first amendment requires, . . ." (Maj. op. p. 1656). But since Article 4667(a)(3) does no more than in general terms authorize an injunction, thus implicitly referring to the basic Texas injunction procedures, it is in fact these latter which the opinion finds procedurally deficient when sought to be employed against obscenity. These procedures are patterned on the Federal ones, Texas Rules of Civil Procedure 680 and 681 which define them being copied from Federal Rule 65, with minor and insignificant textual changes. It is plain, therefore, that a necessary consequence of the majority opinion is to invalidate our Rule 65 procedures to the same extent as the Texas ones, an effect which practitioners in our courts should note. Thus we impliedly hold today that those who crafted and promulgated our own Federal system of injunctions overlooked providing a procedure valid for use in the obscenity context, a somewhat far-reaching and arresting conclusion.

The majority reaches this result by fixing on one word of the Supreme Court's language in two cases arising in a somewhat different context from this, court review of *administrative* censorship. With deference, it seems to me that the contexts are sufficiently dissimilar that the language in question need not and should not be applied here, where no administrator and no censor—only courts—figure in the matter anywhere. The two cases are *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); the word seized upon is the term "final."

In a nutshell, the majority holds that Texas (and hence Federal) injunction procedures are invalid as applied to obscenity because they do not require a "final" ruling on the merits of obscenity before preliminary injunctions may issue against the pornographer, only the ascertainment of that "probable right" thought a sufficient basis for the interlocutory writ in all other contexts. This holding is said to be required by an expression of the Supreme Court in *Freedman*, refined and restated in *Southeastern*, running as follows:

> We held in *Freedman*, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt *final* judicial determination must be assured. 420 U.S., at 560, 95 S.Ct. at 1247 (emphasis added).

The context of *Freedman* and *Southeastern*, however, was very different from

this. Here all action, from start to finish, was judicial; no administrator or censor figured in the matter at any stage;[2] and the only conceivable "prior restraint" would have been a preliminary injunction pendente lite. In *Freedman*, by contrast, there was involved a procedure for the absolute administrative suppression of a film by refusal of a censor's license; and in *Southeastern*, the use of a theatre was administratively refused, thus preventing entirely the production of a musical there. These were "final" administrative acts; final, that is, unless and until those complaining of them took their cases to court and bore the burden of overturning them. In such situations, the quoted formulation by the Supreme Court makes sense and has full application: limiting the censor to a brief, administrative restraint, followed by judicial review at the instance of the censor, with the burden of proof upon him, and a required prompt, final judicial determination ending the administrative ministry one way or the other.

Nor has the Court left us in doubt about why it requires prompt and final judicial action in such a context: it is because "[d]uring the time prior to judicial determination, the [administrative] restraint altered the status quo"[3] and after administrative intervention "a judicial determination must occur 'promptly so that administrative delay does not in itself become a form of censorship.'"[4] In other words, only a brief *non*-judicial interdiction of matter arguably protected by the first amendment will be tolerated; and if material has been taken off the market by a final administrative action pending a judicial decision, that decision must come quickly. Here, however, neither reason for such a rule obtains. There neither was nor could have been any administrative restraint to alter the status quo. Nor could such a restraint (since there neither was nor could have been one) have required hurried judicial action finally upholding or reversing it, lest administrative delay become itself an instrument of suppression.

That these holdings have application to proceedings such as this, which contemplate neither censor nor other administrator but only the normal judicial process, is far from clear to me. To apply, their rule must be rewritten to run as follows: where a preliminary judicial decision resulting from an adversary hearing has been made that matter is probably obscene and should be taken off the market pendente lite, a procedural scheme—to be valid as applied to pornography—must further require that the judge conduct a prompt hearing on the merits of obscenity and render a prompt final judgment on it as well.

I do not deny that there are arguments that can be made in support of such a rule. It seems to me, however, that they are of quite a different sort than those which underlie the rule of *Freedman* and *Southeastern:* that censors (all too often, history teaches, afflicted by tunnel vision) should not be permitted to remove first-amendment

2. Indeed, the only action ever contemplated was a *suit* by the county attorney to obtain an injunction against the showing of obscene motion pictures. King Arts forestalled even this by bringing its own suit in federal court to restrain the county attorney from such an action.

3. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 95 S.Ct. 1239, 1248, 43 L.Ed.2d 448 (1975).

4. *Heller v. New York*, 413 U.S. 483, 489, 93 S.Ct. 2789, 2793, 37 L.Ed.2d 745 (1973), quoting from *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367, 91 S.Ct. 1400, 28 L.Ed.2d 44 (1971).

type matter from the marketplace indefinitely or cast the burdens of going forward or of proof on its purveyors; and that where such matter is censored, prompt and effective review by a judge must be provided so that the matter is, if protected, returned to the marketplace without any lengthy languishing under administrative ban. I hope that I am not insensitive to first amendment considerations and issues; but it seems to me that where mere successive stages of judicial consideration—usually before the same judge—are concerned rather than review by the judge of a censor's fiat, the general procedures which suffice for all other purposes should be sufficient for dealing with pornography.

Conclusion

For the above reasons, I respectfully dissent from Parts II and III of the opinion herein.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

NO. 216,943

THE STATE OF TEXAS, Plaintiff	X X X	IN THE DISTRICT COURT OF
V.	X X	TRAVIS COUNTY, TEXAS
ROY L. STAMBAUGH, d/b/a AUSTIN BOOK MART, Defendant	X X X	126TH JUDICIAL DISTRICT

PERMANENT INJUNCTION

On the 18th day of April, 1974, came on to be considered Plaintiff's application for a Permanent Injunction against Defendant, Roy L. Stambaugh, d/b/a Austin Book Mart, wherein Plaintiff seeks to enjoin Defendant from operating the said Austin Book Mart so as to constitute a public nuisance under Article 4667, Vernon's Texas Civil Statutes, by the habitual use of the premises of the Austin Book Mart for the commercial distribution and commercial exhibition of obscene material as such terms are defined in Chapter 43, Subchapter B, Texas Penal Code; and the State of Texas appearing by her District Attorney and the Attorney General of Texas, and Defendant after due notice appearing (in person) and by his attorneys of record, Hugh Lowe and J. Mack Ausburn; and the Court having heard the evidence and argument of counsel, and it appearing to the Court upon good and sufficient evidence that Plaintiff is entitled to the Permanent Injunction as herein granted, for the reasons that the Defendant has habitually used the premises occupied by the Austin Book Mart for the commercial distribution and commercial exhibition of obscene materials; specifically, the Court finds that

(1) On April 2, 1973, on said premises, the Defendant commercially distributed an obscene motion picture film entitled "The Gunman and his Young Victim". (State's Exhibit No. 19);

(2) On April 9, 1973, the Defendant commercially distributed an obscene motion picture film entitled "The Housewife and the Woodchopper." (State's Exhibit No. 20);

(3) On June 27, 1973, the Defendant commercially distributed an obscene motion picture film entitled "Box Boy". (State's Exhibit No. 21);

(4) On July 27, 1973, the Defendant commercially distributed an obscene magazine entitled "Spring and Fall". (State's Exhibit No. 22);

(5) On November 20, 1973, the Defendant commercially distributed an untitled obscene motion picture film in a box marked "Linda and Gene". (State's Exhibit No. 26);

(6) On December 12, 1973, the Defendant commercially distributed an obscene magazine entitled "The Longhorns". (State's Exhibit No. 24);

(7) On December 13, 1973, the Defendant commercially distributed an obscene magazine entitled "Lovebug". (State's Exhibit No. 25);

(8) On February 4, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "World of Love and Sex". (State's Exhibit No. 28);

(9) On February 4, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "U.S. Sex". (State's Exhibit No. 29);

(10) On February 6, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Adult Garden of Sex". (State's Exhibit No. 33);

(11) On February 8, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "The Sexual Woman". (State's Exhibit No. 12);

(12) On February 25, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Case Histories - A Study of Sadomasochism". (State's Exhibit No. 14);

(13) On February 28, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Wild Couples". (State's Exhibit No. 27);

(14) On March 1, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Boy Friends". (State's Exhibit No. 16);

(15) On March 13, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Boy Play". (State's Exhibit No. 5);

(16) On March 15, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Cinema Sex". (State's Exhibit No. 31);

(17) On March 21, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Trojan". (State's Exhibit No. 32);

(18) On April 5, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Adult Garden of Sex". (State's Exhibit No. 6).

The Court finds that each of the aforesaid motion pictures and magazines are obscene as that term is defined in Section 43.21 of the Texas Penal Code as interpreted by the Court of Criminal Appeals of Texas and as further defined and refined by the Supreme Court of the United States in Miller v. California, ____ U.S. ____ (1973); and the Court further finds that because of the past and continuous operation of the premises of the Austin Book Mart for the commercial distribution and commercial exhibition of obscene materials, that such practice is likely to continue and that Plaintiff should have and is entitled to a Permanent Injunction enjoining the future commercial exhibition and commercial distribution of obscene material; it is accordingly

ORDERED, ADJUDGED and DECREED that the Clerk of the Court issue a Writ of Injunction permanently enjoining the Defendant from operating the premises of the Austin Book Mart so as to constitute a public nuisance through the habitual use of such premises for the commercial distribution and commercial exhibition of obscene material; Defendant is enjoined from commercially exhibiting and distributing the motion pictures and magazines described above; and that the Defendant be permanently enjoined from commercially distributing and commercially exhibiting any other magazine, films, or other materials which pictorially portray deviate sexual intercourse as that term is defined in Section 21.01(1) of the Texas Penal Code, to-wit: Deviate sexual intercourse being any contact between any part of the genitals of one person in the mouth or anus of another; and any magazine, film or other materials which pictorially portray sexual intercourse as that term is defined in Section 21.01(3), to-wit: Sexual intercourse is any penetration of the female sex organ by the male sex organ; and any magazine, film or other materials which pictorially portray the old offense of bestiality as now defined in Section 21.07(a)(4) of the Texas Penal Code, to-wit: An act involving contact between a person's mouth or genitals and the anus or genitals of any animal or fowl; and Defendant is further permanently enjoined from distributing and exhibiting commercially any other motion pictures, magazines or other materials which contain representation or descriptions of ultimate sex acts, normal or perverted, actual or simulated, or which contain representations or descriptions of masturbation, excretory functions and the lewd exhibition of the genitals; all of the aforesaid materials, including those introduced, those that portray deviate sexual intercourse, sexual intercourse, and bestiality, and materials of the type immediately described above, must further be those which have a dominant theme, taken as a whole, which appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken

as a whole, do not have serious literary, artistic, political or scientific value and are utterly without redeeming social value;

The Court, in issuing the injunction described above, is relying only on motion pictures and magazines that were introduced into evidence before this Court and which were either purchased or which were seized pursuant to a search warrant wherein the materials were described by name and by the content and no consideration was given by the Court in reaching its determination herein to any materials that were seized pursuant to the search warrant but were not named and described in the affidavit upon which such warrants rest;

In view of the serious constitutional questions that always arise when prior restraints are imposed upon the distribution of materials that may possibly be protected by the free speech provision of the First Amendment to the United States Constitution and because the imposition of prior restraints must be speedily resolved at an adversary hearing, this Court will not entertain in the future INTERCASE OR AGAINST THIS DEFENDANT any applications for Temporary Restraining Orders without notice to and the opportunity to be heard by the persons sought to be enjoined should the State again seek to proceed under Article 4667, Vernon's Texas Civil Statutes; should any further applications seeking an injunction against the commercial distribution or exhibition of obscene materials be sought, no restraining order or injunction will be issued by this Court until a hearing is held either on the application for a Temporary Injunction, if such a request is made, or until the hearing on the Permanent Injunction if the State does not seek a Temporary Injunction.

Signed and entered this 7 day of MAY, 1974.

JUDGE PRESIDING